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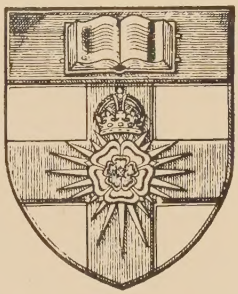

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AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re NATHAN NEWMAN & CO.

C. A. 1887 Feb. 9.

Practice—Winding-up—Service out of the Jurisdiction—Service of Notice to settle List of Contributories—General Orders and Rules of Nov. 11, 1862, *r.* 30.

A notice under the General Order of Nov. 11, 1862, r. 30, of an appointment to settle the list of contributories of a company may be served out of the jurisdiction in manner provided by rule 60.

In re Anglo-African Steamship Company (1) distinguished.

THIS was a limited company. An order for winding it up was made on the 24th of July, 1886, and an official liquidator was appointed.

A list of contributories was carried into Chambers, and of the persons included in it twenty-two were resident in *Ireland* or *Scotland*. Notices in the form No. 26 to the General Rules of 1862 of the appointment to settle the list were served on all the alleged contributories by posting them in the manner prescribed by rule 60, and the service was verified by affidavit according to form 27 to the same rules.

The Chief Clerk, having regard to *In re Anglo-African Steamship Company* (1), considered that service on the members out of the jurisdiction was invalid and declined to include them in the list. The matter was then, on the application of the official liquidator, referred to Mr. Justice *North*, who on the 20th of January, 1887, made in Chambers an order stating his opinion

(1) 32 Ch. D. 348.

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that the service of the notice on the contributories out of the jurisdiction was not good service, and that he had no jurisdiction to give leave to serve such a notice, there being no authority for serving or giving leave to serve notices out of the jurisdiction, and he ordered that the persons out of the jurisdiction should be excluded from the list, giving the official liquidator leave to go direct to the Court of Appeal if so advised.

The official liquidator accordingly appealed *ex parte*.

Buckley, Q.C., and *Levett*, for the Appellant:—

Rule 30 says that the official liquidator shall "give notice in writing" of the appointment to settle the list, and though the rule goes on to say that the notice "shall be served" it is not expressed in the terms in which service intended to found proceedings against a person is directed. Rule 33 provides for giving notice by advertisement, and it is not till we come to rules 34 and 35 that we find service in the technical sense required where it is wished to enforce an order against a man personally. The case of *In re Anglo-African Steamship Company* (1) was quite different from the present. There the application was to serve notice of an order for a call, as preliminary to taking steps to enforce the call, and there is nothing in the judgment opposed to the view that service out of the jurisdiction of a notice of this kind, which is not given for the purpose of founding jurisdiction against a person, but only for the purpose of giving him information, can be ordered.

[*Re General International Agency Company* (2), and *In re Land Credit Company of Ireland* (3), were also referred to.]

COTTON, L.J.:—

In this case I think that Mr. Justice *North* has taken an erroneous view. He probably thought that the case was governed by *In re Anglo-African Steamship Company*, but that was a very different case. There it was sought to serve on persons residing out of the jurisdiction an order for a call, with a view to found proceedings against them to compel payment, and it was held

(1) 32 Ch. D. 348. (2) 16 L. T. (N.S.) 725.
(3) 39 L. J. (Ch.) 389.

that the Court had no jurisdiction to order such service. In the present case the notice is not intended to be the foundation of any proceedings against the persons on whom it is served. The official liquidator is only performing a duty cast upon him by the *Companies Acts* of giving certain information to persons whom it is proposed to place on the list of contributories. A foreigner may be on the list, and all that has been done here is to give notice to the persons served that it is intended to place them on the list. Service of a notice of that kind is a very different thing from service of an originating summons or of a notice intended to be the foundation of proceedings substituted for an action. It is merely a notice that they will be placed on the list unless they shew cause to the contrary, and is quite of a different nature from the notice in *In re Anglo-African Steamship Company* (1). I am of opinion, therefore, that the service was good, and that the Judge ought to proceed to settle the list.

LINDLEY, L.J.:—

I am of the same opinion. There is a wide distinction between service of a notice such as that in the present case, and service of an order for a call with a view to founding proceedings to enforce payment. The service of such a notice as this is no infringement of the jurisdiction of the Courts of a foreign country. If notices of this kind could not be served abroad, it might in many cases be impossible to wind up a company at all.

LOPES, L.J.:—

I am of the same opinion. The case appears to me entirely different from that of *In re Anglo-African Steamship Company.*

Solicitors: *Michael Abrahams, Son, & Co.*

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In re DIXON.
DIXON *v.* SMITH.

[1885 D. 174.]

Separate Estate—Restraint on Anticipation—Payment to Married Woman under Order reversed on Appeal—Lien on Separate Estate—Liability of Married Woman not arising from Contract.

A female infant entitled under a will to a share of residuary personalty contingently on her attaining twenty-one, married before—but came of age after—the commencement of the *Married Women's Property Act*, 1882. On her marriage a settlement of her property, not sanctioned under the *Infants' Settlement Act*, was made, under which she took the first life estate with a restraint on anticipation. On her coming of age the fund was paid to her under an order of the Court. The Court of Appeal reversed this order and declared her liable to refund, on the ground that the fund was subject to the settlement. She refunded part, but was unable to refund the remainder, which she had spent. After this the executors of the will paid to the trustees of the settlement an arrear of income which they had in hand:—

Held, that so much of this income as accrued between the married woman's attaining twenty-one and the order declaring her liability to refund must be retained in part satisfaction of her liability to refund.

Pike v. *Fitzgibbon* (1) distinguished.

THOMAS DIXON, by a third codicil, dated the 25th of March, 1871, to his will, dated the 14th of July, 1866, gave a share of his residuary estate in trust for such of the children of his late son *W. J. Dixon*, as being a son should attain twenty-one, or being a daughter attain that age or marry with such consent as therein mentioned. The testator died in 1879. Shortly after his decease *Emily Phyllis Dixon*, one of the two children of *W. J. Dixon*, married *Edward Last Smith*. She was then aged sixteen, and did not obtain such consent as was mentioned in the will. Previous to her marriage, articles, dated the 11th of September, 1879, for a settlement of all property to which she might become entitled under the will and codicils of the testator were executed, but the sanction of the Court under the *Infants' Settlement Act* was not applied for. Under these articles she took the first life interest with a restraint on anticipation. On the 9th of November, 1884, she attained twenty-one, and in September, 1885, the sum of

(1) 17 Ch. D. 454.

£9000, being the bulk of the share, was paid to her on her separate receipt under an order of Vice-Chancellor *Bacon* of the 29th of April, 1885, made on an originating summons. The Vice-Chancellor proceeded upon the ground that the settlement was not binding on her, and, following *Baynton* v. *Collins* (1), that under the *Married Women's Property Act*, 1882, she was entitled to the share for her separate use. The trustees of the settlement appealed, and on the 16th of March, 1886, the Court of Appeal held, in accordance with *Reid* v. *Reid* (2), that she was not so entitled, and that the share was subject to the trusts of the settlement, and that the sum paid to Mrs. *Smith* ought to be refunded. In the interval between the order of Vice-Chancellor *Bacon* and that of the Court of Appeal Mrs. *Smith* had spent about £1900 out of the £9000, and had invested the rest, being about £7100. By the order of the Court of Appeal she was ordered to pay the £7100 to the trustees of the settlement, and liberty was given to them to apply to the Court of Appeal as to the balance, it being alleged that she was unable to replace it. On the 1st of June, 1886, they did so apply, and upon evidence that she had no property except what was in the settlement, the income of which she was restrained from anticipating, the Court of Appeal declared that it was not expedient that the trustees of the settlement should take any proceedings to recover the balance. Subsequently, on investigation of the accounts of the trustees of the will, it was discovered that they had in hand a sum of £1648 9*s.* 7*d.* arrears of income on the share of Mrs. *Smith*. Part of these arrears accrued before she attained twenty-one and the rest afterwards. The whole of this sum was paid by the trustees of the will to the trustees of the settlement, who thereupon applied to the Court of Appeal for directions as to the disposition of that fund. The application was heard on the 16th of February, 1887.

Ince, Q.C., and *Borthwick*, for the trustees of the settlement.

Marcy, for Mr. and Mrs. *Smith*, contended that there was no lien on the income of Mrs. *Smith*, she being restrained from anticipation: *Pike* v. *Fitzgibbon* (3).

Ince, in reply.

(1) 27 Ch. D. 604. (2) 31 Ch. D. 402. (3) 17 Ch. D. 454.

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COTTON, L.J.:—

This case is entirely different from *Pike* v. *Fitzgibbon* (1). There what was sought was to enforce a liability arising from contract. Now a married woman (apart from the Act of 1882) cannot enter into a contract, except that if she has separate estate she may contract so as to bind herself with respect to that separate estate which she has at the time of the contract, if there is nothing to prevent her contracting as to that fund. A restraint on anticipation does prevent her so contracting. But here Mrs. *Smith* received a sum which she ought not to have received, the Vice-Chancellor having erroneously ordered it to be paid to her. That order was reversed on appeal, and it was the duty of the Court to declare Mrs. *Smith* to be bound to refund the sum which she had received under it. That entirely distinguishes the case from *Pike* v. *Fitzgibbon*, where the liability arose from contract. So much of the £1648 9*s.* 7*d.* as arises from income accrued up to the time when Mrs. *Smith* attained the age of twenty-one forms part of the capital and is bound by the settlement. This will be retained by the trustees of the settlement as part of the property included in it and will not reduce Mrs. *Smith's* liability for the £1900. So much as arises from income accrued due between Mrs. *Smith's* attaining twenty-one and the order of the 16th of March, 1886, will be retained by the trustees in part satisfaction of her liability to refund the £1900. So much as arises from income accrued since the 16th of March, 1886, is protected by the restraint on anticipation and will be paid to Mrs. *Smith*. Of course what I have said does not apply to liabilities of a married woman under the Act of 1882.

LINDLEY, L.J., concurred.

LOPES, L.J.:—

I entirely agree. The case is quite different from *Pike* v. *Fitzgibbon*.

Solicitor for Mr. and Mrs. *Smith*: *Charles Mallam*.

Solicitors for Trustees of the Settlement: *Grover & Humphreys*.

(1) 17 Ch. D. 454.

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In re CLOUGH.
BRADFORD COMMERCIAL BANKING COMPANY *v.* CURE.

[1885. C. 700]

Practice—Security for Costs of Appeal.

Notice of appeal from an interlocutory order was served on the 8th of February. On the 10th of February the Respondent gave notice of motion for security for costs. The appeal motion and the motion for security came into the paper on the 16th. Poverty was sufficiently established, and it was also sworn to and not denied that the person really promoting the appeal was a person of substance:—

Held, that security ought to be given.

Pooley's Trustee v. *Whetham* (1) distinguished.

ON the 8th of February, 1887, the Defendant *William Clough* served notice of appeal from two orders made by Mr. Justice *North* at Chambers, by one of which he dismissed an application of the Defendants *William Clough* and *John Henry Clough* for certain accounts; and by the other of which he ordered those Defendants to execute a certain conveyance. This notice was addressed to the Plaintiffs, the Defendants *Cure* and *John Henry Clough*, and to *Collins*, the person to whom the property was to be conveyed.

On the 10th of February the Plaintiffs and the Defendant *Cure* severally gave notice of motion for security for the costs of the appeal.

Both the appeal and the motions for security for costs came into the paper for hearing on the 16th of February.

The applications for security were supported by strong evidence of the insolvency of the Appellant. One of the solicitors for the Plaintiffs deposed that the Defendants *Clough* had repeatedly changed their solicitors, and that the real person who was instructing their solicitors was a Mr. *S. Smith*, a person of means and well able to pay the costs. This allegation was not contradicted.

(1) 33 Ch. D. 76.

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J. G. Wood, for the Plaintiffs:—

We gave notice for security for costs as early as we could, and we ought not to lose it because the appeal has come into the paper with such unexpected rapidity.

Eyre, for *Cure*:—

The case is governed by the principles laid down in *In re Indian, Kingston and Sandhurst Mining Company* (1).

Decimus Sturges, for the Appellant:—

This application is too late. The whole of the expenses of the appeal on both sides have been incurred, and the only effect of ordering security for costs, if the Appellant cannot find it, will be that these expenses will have been thrown away. Security will not be ordered under such circumstances: *Pooley's Trustee* v. *Whetham* (2). The Court is not so much in favour of security for costs when the ground is poverty, as when it is that the Appellant is out of the jurisdiction: *In re Indian, Kingston and Sandhurst Mining Company.*

COTTON, L.J.:—

As a general rule the Court will not order security for costs if the application comes on when the appeal is in the paper or very nearly in the paper, it being considered unreasonable to order it when the application is delayed until the expenses of the appeal have been incurred. In the present case notice of application for security was given almost immediately after the notice of appeal had been served. That distinguishes the case from *Pooley's Trustee* v. *Whetham*. In that case the notice of the application was given very late, here within two days from the notice of appeal. The Applicants, therefore, have been very prompt. We have also this additional circumstance: it is sworn to and not denied that the Appellant is not the party really prosecuting the appeal, and that the person really promoting it is a person of substance well able to pay costs. Security will be ordered on each appeal.

(1) 22 Ch. D. 83. (2) 33 Ch. D. 76.

LINDLEY, L.J.:—

I agree. There are two special circumstances taking the case out of the general rule. The Respondents have been guilty of no delay, and there is a substantial person in the background who is the person really prosecuting the appeal.

LOPES, L.J.:—

This case is distinguished from *Pooley's Trustee* v. *Whetham* (1) by there having been no delay, and we have the additional circumstance that it is sworn to and not denied that there is a person of substance in the background who is really the person prosecuting the appeal.

Solicitors for Plaintiffs: *Flower & Nussey*, for *Killick & Co., Bradford.*

Solicitors for *Cure*: *Jaques & Co.*

Solicitors for Appellant: *Vincent & Vincent.*

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GOODFELLOW *v.* PRINCE.

[1886 G. 1495.]

Trade-name—Trade-mark—Label—Injunction—Patents, Designs and Trade-marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 77, 103.

In July, 1885, *M.*, of *Dizy* in *France*, commenced the consignment to the Plaintiff in *London* of champagne under the label "*Le Court et Cie, Reims*," which had then recently been registered in *France* as his trade-mark, and to which in December, 1886, his right was established in proceedings against *X.* before the French tribunal. Further consignments were made to the Plaintiff down to July, 1886, and advertised and sold by him as *Le Court et Cie's* champagne. In March, 1886, the Defendant, trading under the name of "*Short & Co.*," began to sell (chiefly at a wine bar across the counter) champagne which was sent to him from *France* by *X.* as *Le Court et Cie's* champagne; and it appeared that in 1882 he had proposed to register in *France* a label with the name *Le Court et Cie* as corresponding to his own trade-name of *Short & Co.*, but from difficulties

(1) 33 Ch. D. 76.

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in obtaining registration abandoned the idea. Upon motion by the Plaintiff to restrain the use of the name and brand by the Defendant:—

Held, by the Court of Appeal, reversing the decision of Chitty, J., that neither on the ground of trade-mark nor of trade-name was the Plaintiff entitled to an injunction against the Defendant: in the former case because, the label being capable of registration in this country and not having been registered, the Plaintiff was precluded by sect. 77 of the *Trade-marks Act*, 1883, from instituting proceedings to restrain infringement of a trade-mark: and in the latter because the evidence failed to shew that either by long user or reputation had the wine sold under the name and brand "*Le Court et Cie*" become so associated with the wine of the Plaintiff as to enable him to assert his common law right of restraining another person from passing off his goods as those of the Plaintiff.

MOTION to restrain the Defendant from manufacturing or using in connection with the sale of champagnes not manufactured, sold, or shipped by or for the Plaintiff, any labels or other devices bearing the name "*Le Court et Cie*," or any colourable imitation of the labels used by the Plaintiff in connection with the sales of his champagne, and from selling or advertising under such name any champagne not manufactured, sold, or shipped by or for the Plaintiff.

In July, 1885, the Plaintiff, who is a wine merchant in the City, entered into an arrangement with *Moigneaux père et fils*, a firm of champagne shippers at *Dizy* near *Epernay*, for the supply to him of a particular growth of champagne, together with the exclusive right to adopt and use in this country the label *Le Court et Cie, Reims*, which had been registered by *Moigneaux père et fils*, on the 5th of July, 1885, as their trade-mark under the law of *France*, and to the use of which in *France* they were solely entitled. Under this arrangement large consignments of champagne were sent to the Plaintiff in this country and sold by him, chiefly to private customers, under the name and bearing the label *Le Court et Cie, Reims*, between July, 1885, and July, 1886, when this action was brought. In evidence that the champagne sold by Plaintiff under this name had acquired reputation with the public, the price list of the *Civil Service Co-operative Society*, on which *Le Court et Cie's* champagne had been placed, was produced.

The Defendant carried on business as a wine and spirit merchant in the *Strand* and in *Pope's Head Alley, Cornhill*, under the name

Short & Co., and his trade was chiefly in selling wine across the counter. Since 1880 he had been supplied with champagne by *Moigneaux père et fils* under a label bearing their own name. It appeared that in 1883 he had applied to *Moigneaux* to have champagne shipped to him in his own name and label, and he suggested *Le Court et Cie* as being the French translation of *Short & Co.* A label was accordingly prepared for him, but from a difficulty in obtaining registration in *France* of this label with the accompanying design it was abandoned by the Defendant, who stated in his evidence that in his trade customers did not trouble about the name on the bottle so long as they got the wine good, but asked simply for a glass of champagne.

In February, 1886, the Defendant being, as he stated, dissatisfied with the quality of the wine supplied to him by *Moigneaux*, began to deal with *Mercier et Cie*, and sent them over a label bearing a design and the words *Le Court et Cie* with instructions to get it registered as a trade-mark in *France* and to use the same on all champagne shipped to him. Between February and July, 1886, some 500 dozen of champagne bearing this label had been shipped to the Defendant and sold by him.

The Plaintiff, on ascertaining the fact of the Defendant's user, remonstrated, and subsequently, in July, 1886, brought the present action to restrain the use by the Defendant of the name *Le Court et Cie*, to which the Plaintiff claimed to be exclusively entitled in this country.

It appeared that proceedings had been taken by *Moigneaux père et fils* before the tribunal of *Epernay* to restrain the use of labels bearing the words *Le Court et Cie* by *Mercier* and one *Michel Levy*, who had printed the labels for *Mercier*, and on the 4th of December, 1886, judgment by default was pronounced in favour of *Moigneaux père et fils*, with compensation from both Defendants, and the usual direction that the decision should be advertised by the Defendants at their own expense.

The Plaintiff had not registered the name and label "*Le Court et Cie, Reims*," as a trade-mark in this country.

The motion came before Mr. Justice *Chitty*, on the 17th of December, 1886.

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Romer, Q.C., and *J. G. Butcher*, in support of the motion :—

The Plaintiff has established his right by substantial user to the name *Le Court et Cie* as a trade-name denoting champagne imported by him from the owners of that brand and name in *France* and sold by him in this country. There is no deception or misrepresentation by the Plaintiff in the use of the name, as upon the evidence it is the custom in the trade to adopt fictitious names without in any way suggesting that there is an existing firm of that name. In this case it is proved that our shippers, *Moigneaux père et fils*, have established before the French tribunals their right to the exclusive use in *France* of the name and brand *Le Court et Cie*. We do not suggest, and it is not necessary to establish, that the use of the name by the Defendant was fraudulent, but when his attention was called to our prior right he ought to have discontinued the use of the name; and the misleading and wrongful act will be restrained: *Hendriks* v. *Montagu* (1). In that respect there is no distinction between the wrongful assumption of a trade-mark and of a trade-name: *Sebastian* on Trade-marks (2).

Macnaghten, Q.C., and *Maidlow*, for the Defendant :—

The question is whether the Plaintiff has validly appropriated the name *Le Court et Cie*. We say that the Plaintiff's use of the name involves the untrue representation that he is the sole agent in this country of an existing firm of that name at *Reims*. To enable the Plaintiff to succeed in restraining the use by others of his trade-mark or name the trade-mark or name must not involve any false representation: *McAndrew* v. *Bassett* (3). Where the object is to induce the public to buy one thing when they think they are buying another, the Court will not protect speculations of that kind: *Estcourt* v. *Estcourt Hop Essence Company* (4).

Romer, in reply.

CHITTY, J.:—

This motion relates to the trade-name *Le Court et Cie* in reference to champagne imported from *France* into this country.

(1) 17 Ch. D. 638.
(2) 2nd Ed. p. 225.
(3) 4 D. J. & S. 380.
(4) Law Rep. 10 Ch. 276, 281.

The name is claimed by both Plaintiff and Defendant, and the case has been argued on both sides as a question of trade-name as distinguished from trade-mark. The law on this point is thus stated by Lord *Blackburn* in *Singer Manufacturing Company* v. *Loog* (1): "There is another way in which goods not the plaintiffs' may be sold as and for the plaintiffs'. A name may be so appropriated by user as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade-mark, properly so called, or within the recent statutes. Where it is established that such a trade-name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for the plaintiffs', just as much as the use of a trade-mark; and I think the law (so far as not altered by legislation) is the same. And I think it settled by a series of cases, of which *Hall* v. *Barrows* (2) is, I think, the leading one, that both trade-marks and trade-names are in a certain sense property." That appears to me to lay down the law correctly with reference to a trade-name, and the first question is whether the Plaintiff has appropriated the name in question by user. The result of the evidence is that the Plaintiff had sold to his own customers —private customers as distinguished from the trade—a substantial quantity of this wine, and that before March, 1886, he had used the name *Le Court* with reference to this champagne to a substantial extent and sufficient to justify me in concluding, as a matter of law, from the fact, that he had appropriated the name sufficiently. Fresh importations of the wine were afterwards made, and at the time when the Defendant first began to sell champagne under the name in question, the evidence is sufficient to establish *primâ facie* in the Plaintiff a right to the trade-name. But then it is said that the user by the Plaintiff involves a misrepresentation. If that be so it is clear that the Court would not afford any protection. The law is tersely stated by Lord *Cairns* in *Estcourt* v. *Estcourt Hop Essence Company* (3): "I do not express

(1) 8 App. Cas. 15, 32. (2) 4 D. J. & S. 150.
(3) Law Rep. 10 Ch. 281.

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any opinion whether the use of these compounds would come within the description of adulteration, but clearly the object was to induce the public to buy one thing when they thought they were buying another. It is not the province of this Court to protect speculations of this kind." The misrepresentation alleged is that there is no such firm as *Le Court et Cie* carrying on business in *France*, and it is contended therefore that the use of this name is fraudulent, because it represents to the public that there is such a firm as *Le Court et Cie* carrying on business in *France* as growers or as merchants, whereas in fact there is no such firm. Now it is material on this point to observe that *Moigneaux père et fils* have established in *France* as against *Mercier et Cie*, who have been recently supplying the Defendant, the right to the exclusive use of the name *Le Court et Cie*. And being entitled to use that name in *France* as a brand for their wines *Moigneaux père et fils* have exported their wines under that name to the Plaintiff in this country. Now I am unable to find that there is any fraud in this. If there had been any fraud no practice or custom of the trade would justify it. But, in my opinion, there is no fraud. Test the matter in this way. When the wine is first introduced into the market the buyer does not care much about the brand, he knows nothing about it. But as the reputation of the wine grows in the market the buyer asks for and gets the wine that he intends to buy under the name *Le Court et Cie*. There is no deception, the customer is not deceived as he gets the article that he intends to get; and it is plain that there is no object there to induce the public to buy one thing when they think they are buying something else. I should be slow to countenance anything that I considered a trick of trade, but the law of *England* allows a man to trade without fraud under any name he pleases, and it appears to me that there is no misrepresentation here, seeing that *Moigneaux père et fils* were entitled according to the law of *France* to use that name as a brand for their champagne.

I now turn to the Defendant's case. Some evidence was given of an intention to use the name "*Le Court et Cie*" on the part of the Defendant so long ago as 1882, but any case founded on that has been abandoned at the bar, for when the evidence came to be

examined it appeared clearly that there had been no user of the name. The Defendant, who trades under the name of "*Short & Co.*," seems from his evidence to consider that he was entitled to the name of "*Le Court & Co.*" as being, as he is told, the equivalent in French for his own trade-name. But, of course, he would have no right to use that name as against the Plaintiff unless he had a prior title or so long an established user as would justify him in doing it. On the facts, therefore, I hold that the user by the Defendant cannot be dated back to 1882, and further, that his subsequent user is subsequent to that of the Plaintiff. Now, the Defendant not being aware of the Plaintiff's user of the name in the English market, made an arrangement in February, 1886, with *Mercier & Co.* for the supply to him of champagne under this name or brand, and the Defendant received a consignment of 100 dozen at the end of February from *Mercier & Co.* On the evidence it is clear that the user by the Defendant from the end of February or beginning of March, 1886, until the beginning of July, was an innocent user. It is plain also that the Plaintiff was not aware during that period that the Defendant was using the name, and consequently no case of acquiescence can be made against the Plaintiff in respect of the user by the Defendant during that period. But in July the Plaintiff discovers that the Defendant is using the name and immediately applies to him by his solicitor asking him to discontinue. The Defendant declines, and in July the writ is issued and the motion is made. The case stood over for some time by reason of the cross-examination of the parties before an examiner. [His Lordship referred to the cross-examination of the Defendant as shewing that this brand of *Le Court* was of very little value to the Defendant in his trade.] Now there may be with regard to trade-marks two, if not three, independent rights to use the same trade-mark. That is so according to the present Act, and the late Master of the Rolls held in many cases before the late Act that up to three the mark might be used by independent title. It is possible in law to say that the same trade-name might be used by several firms or traders under concurrent rights, each having an independent right. But, I think, in this case the Defendant was not justified, after his attention was called to the fact of the Plaintiff's right, to

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go on using the name. Though during a short period his user was innocent and his trade considerable—for he sold according to the evidence about 500 dozen—yet I think that as soon as his attention was called to the fact that the Plaintiff was using the name it was his duty to submit under the circumstances. I think he has not by a sufficient length of time acquired so great a trade as to enable him to say he has a concurrent right to the name with the Plaintiff. The result, therefore, is that I think he was not justified in using it. I have referred to the nature of the Defendant's trade to shew that if I accede to the Plaintiff's application I shall not be destroying or interfering with a well-established trade on the part of the Defendant. For the reasons I have stated the Plaintiff is therefore entitled to an injunction.

F. G. A. W.

C. A.

The Defendant appealed from this judgment. The appeal came on for hearing on the 16th of February, 1887.

Since the hearing before Chitty, J., an appeal which had been brought by *Mercier* against the judgment of the French Court had been dismissed.

Cozens-Hardy, Q.C., and *Maidlow*, for the Appellant:—

There is here no trade-mark. It is not shewn that the public are deceived, and the Defendant cannot be restrained. The name was not registered in *France* till some one had agreed to supply him with wine from that country. There is no such person as *Le Court* who manufactures champagne. This is a fraudulent representation on the part of the Plaintiff, which disentitles him to the aid of the Court. Mr. Justice *Chitty* did not construe correctly the judgment of Lord *Blackburn* in *Singer Manufacturing Company* v. *Loog* (1) with reference to the appropriation of a name. The goods must be known in the market by the name of the person who seeks to restrain another. The Plaintiff had hardly sold any of his wine at the time when he complained of our using the name, so there was no public reputation. The Plaintiff represents himself as the sole agent of a

(1) 8 App. Cas. 15, 32.

firm which does not exist, and has no right to a monopoly of that falsehood. [*Burgess* v. *Burgess* (1); *Hall* v. *Barrows* (2); *Massam* v. *Thorley's Cattle Food Company* (3); *Thorley's Cattle Food Com-* v. *Massam* (4); and *In re Wood's Trade-mark* (5), were referred to.]

Romer, Q.C., and *J. G. Butcher*, for the Plaintiff:—

A trade-name of this class stands on the same footing as a trade-mark for all practical purposes. The Plaintiff's business is no doubt comparatively small, and in a small area, but it is a growing business, and the Defendant has come within the same area, and the Plaintiff's customers are induced to believe that the wine sold by the Defendant is the Plaintiff's wine. There is no real injury caused to the Defendant by the injunction; he has not shewn a long and continued user concurrently with the Plaintiff's, in which case it might be different, and as no one but *Moigneaux & Co.* have a right to this name, and that right they have assigned exclusively to the Plaintiff, the Defendant will be unable to import wine under that name into the country.

The Plaintiff has been guilty of no deception. *Moigneaux* used a name to design the particular wine they exported to us. They are champagne growers in *Reims*. The Defendant might be as well accused of misrepresentation for trading under the name of *Short & Co.*

The case of *In re Wood's Trade-mark* was very different. There a representation was made that the cigarettes were made in *Turkey* and *St. Petersburg*, when in fact they were made in *London*.

Maidlow, in reply:—

The Plaintiff is confusing a trade-mark and a trade-name. *Moigneaux* obtained in *France* a right to a trade-mark—the particular label. That could have been registered in this country, either by them or the Plaintiff, under the *Patents, Designs, and Trade Marks Act*, 1883, sect. 103, and that being so, sect. 77 prohibits any action to restrain infringement before registration; but the time for so doing has passed, sect. 103, sub-s. 2.

(1) 3 D. M. & G. 896.
(2) 4 D. J. & S. 150.
(3) 14 Ch. D. 748.
(4) Ibid. 763.
(5) 32 Ch. D. 247.

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Then the Plaintiff is thrown back on his Common Law right to prevent deception, and must comply with the conditions pointed out by Lord *Blackburn*, and this he has failed to do, so on both grounds the Plaintiff ought to fail.

COTTON, L.J.:—

Mr. Justice *Chitty* has granted an injunction to restrain the Defendant from manufacturing or using in connection with the sale of champagne not manufactured, sold, or shipped by or for the Plaintiff, any labels or other devices bearing the name of "*Le Court et Cie*" or any colourable imitation. I cannot agree with the learned Judge. He has granted the injunction on the ground that what was done by the Defendant amounted to a representation that the wine he was selling under the name of "*Le Court et Cie*," was the Plaintiff's wine. I cannot come to that conclusion. In 1885, before the Defendant had used the name (for I think the evidence is that the Defendant only began to use the name on the champagne he was dealing in in February, 1886), the Plaintiff had communications with *Moigneaux père et fils*, wine merchants in *France*, who, in July, 1885, had acquired a right in *France* by registration to a particular label which is "*Le Court et Cie, Reims.*"

Shortly afterwards they contracted with the Plaintiff to export to him exclusively wine with that label, that is to say, to give to him as regards wine bought from them the benefit of that label. Now that label could have been registered in *England* within the period limited by the *Patents Act*, 1883, s. 103, being a label, and not the mere name "*Le Court et Cie*," which probably could not have been registered. Sect. 77 of the Act then provides that a person shall not be entitled to institute any proceedings to prevent or to recover damages for the infringement of a trade-mark "unless in the case of a trade-mark capable of being registered under this Act it has been registered in pursuance of this Act."

If it were in fact shewn that the representation made by the Defendant was a representation that the wine he was selling was the Plaintiff's, the case would have stood on a different footing. But that, in my opinion, is not the case. Both Plaintiff and Defendant represent that they are importing wine from manufac-

turers in *France*, and both of them say that these manufacturers, who are wine merchants, are *Le Court et Cie.*

It is very true that there is evidence that previously to February, 1886, there had been a sale of some fifty dozen of this champagne by the Plaintiff; but we know that some merchants sell wine made by certain firms in *France* with the label of those firms upon it without in any way representing that they are, or being considered to be, sole importers of that wine, or the wine with that label, *e.g. Perrier Jouet.* Therefore the fact that this wine had been sold by the Plaintiff to various customers, although it shews that in the market there was a wine with this name, would not, in my opinion, shew that the use of this label by another person would amount to a representation, not that it was the manufacture of the same person in *France*, but that it was the same manufacture as the Plaintiff's, that is to say the Plaintiff's wine. Therefore what the Plaintiff intended to do (though the injunction granted goes further), was to prevent the Defendant from selling wine not manufactured by or coming from *Moigneaux père et fils*, with their label, to which he has the exclusive right. If he had intended to rely on that label in *England*, he should have registered the label as his trade-mark, or got *Moigneaux père et fils* to register it, and unless he does so, his bringing an action to prevent that label being affixed to wine not coming from them, is an attempt to get for them the sole and exclusive right to the use of that label in *England*, but that is prohibited by sect. 77 of this *Patents, Designs, and Trade Marks Act.*

Under these circumstances, not considering on the evidence that the use of this label is in fact any representation that this is the wine of the Plaintiff, the injunction ought in my opinion to be dissolved.

LINDLEY, L.J.:—

I have come to the same conclusion.

The simplest way of looking at the case is to suppose that *Moigneaux père et fils* were the Plaintiffs here; and to suppose that the whole of the evidence before us was that they were the registered owners in *France* of the label which they have registered there, and that they began in July, 1885, to import and had

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imported here small quantities of champagne—some fifty cases—not registering their label at all, could they on this supposition have said that they had acquired in this country such an exclusive right either to the label, or the name "*Le Court et Cie*," as would entitle them to restrain by injunction the use by anybody else of the label or name?

I must say I think their case, whether based on the label or the name, would fail on the evidence. On the label they would fail for want of registration. There is none here, nor do they say, apart from the name, that the Defendant is copying their label. On the name they would be driven to put their case on the old Common Law theory, that they were entitled to prevent the Defendant passing off his goods as theirs. But to do that they would have to shew that they had used the name "*Le Court et Cie*" to such an extent or for so long a time as to associate the name with their wine, and their case on the name upon the present evidence would fail.

But the Plaintiff is suing in his own name. He happens to have, as I think is proved, the sole right from *Moigneaux & Co.* of importing into this country the wine which they sell in *France* under the name of "*Le Court et Cie.*" The Plaintiff has not registered any trade-mark, and besides he fails on the evidence in associating the champagne sold under the name "*Le Court et Cie*," with that sold by him; he has not got such a right to the exclusive use of the name by user or reputation as to entitle him to maintain an action, either for damages or injunction, against anybody else in this country who uses the same name.

I have nothing to say in favour of the Defendants, it is the defect in the Plaintiff's title which is fatal to the Plaintiff's case.

LOPES, L.J.:—

In the *Singer Manufacturing Company* v. *Loog* (1) Lord *Blackburn* laid down the law thus: "A name may be so appropriated by user as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade-mark, properly so

(1) 8 App. Cas. 15, 32.

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called, or within the recent statutes. Where it is established that such a trade-name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for the plaintiffs' just as much as the use of a trade-mark." Applying that principle here, and regarding the evidence, I can find no such appropriation by user of the name of "*Le Court et Cie*," as to cause that word to mean the goods of the Plaintiff. If that is not established, the Defendant cannot be said to be passing off his goods as those of the Plaintiff. The appeal must be allowed.

Solicitors: *F. Romer; Ford, Lloyd, Bartlett, & Michelmore.*

M. W.

BUCKMASTER *v.* BUCKMASTER.

C. A. 1887 *Feb.* 15, 17, 18.

[1856 B. 222.]

Infant—Married Woman—Ward of Court—Post-nuptial Settlement—Reversionary Interest in Personal Estate—Jurisdiction of Court—Infants' Settlement Act, 1855 (18 & 19 *Vict. c.* 43) [*Revised Ed. Statutes, vol. xii., p.* 468.]

The Court of Chancery never had, nor has the High Court now, jurisdiction to compel a ward of Court to make a settlement of his or her property.

The *Infants' Settlement Act*, 1855 (18 & 19 Vict. c. 43), has removed the disability of infancy only, leaving unaffected other disabilities, *e.g.*, coverture and lunacy—and, under the Act, having regard to the decision of *In re Sampson & Wall* (1), an infant married woman may do all that an adult married woman could do but not more.

Consequently in a case not falling within *Malins' Act* (20 & 21 Vict. c. 57), or the *Married Women's Property Acts*, a post-nuptial settlement by a female infant ward of Court of her reversionary interest in personal estate will not bind that property or deprive her of her right to it by survivorship if the interest does not fall into possession during the coverture.

A settlement of such interest (notwithstanding its approval by the Judge) is void and incapable of confirmation, and can be validated only by something which amounts to a new disposition by her while *sui juris*.

Decision of *Bacon*, V.C., reversed.

THIS was an appeal from an order of Vice-Chancellor *Bacon* (2). In April, 1862, Mrs. *Seaton*, then *Louisa Christian Buckmaster*,

(1) 25 Ch. D. 482. (2) 33 Ch. D. 482.

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a ward of Court, aged eighteen years, married *Charles Seaton* without the sanction of the Court or the knowledge of her mother and guardian. An order made by Vice-Chancellor *Wood* on the 15th of May, 1862, directed an inquiry whether there had been a valid marriage, and, if so, what Mrs. *Seaton's* fortune was, and what would be a proper settlement of it.

A settlement was executed on the 9th of July, 1863, by which Mrs. *Seaton* purported to assign her property, which, by the Chief Clerk's certificate had been found to consist of an undivided share in reversion expectant upon her mother's death, of her father's residuary personal estate, under his will dated the 31st of July, 1838, upon trusts for herself for life, with remainder to such of the children of the marriage as she and her husband should jointly, or as the survivor should appoint, and in default of appointment for the children of the marriage equally at twenty-one or marriage—with ultimate trusts for the benefit of Mrs. *Seaton*. The settlement was signed by the Chief Clerk as having been approved by Vice-Chancellor *Wood*, and was executed by husband and wife.

There were issue of the marriage four children, all of whom were infants. On the 19th of July, 1873, upon a petition presented by (among others) Mr. and Mrs. *Seaton*, a sum of £5045 Consols, part of the sum standing in Court to the credit of the cause, as representing the testator's estate, was transferred to the trustees of the settlement as part of Mrs. *Seaton's* settled share, Mrs. *Seaton's* mother giving up her life interest. Mrs. *Seaton's* mother died on the 19th of April, 1886, whereupon the reversionary interest fell into possession.

On the 27th of April, 1882, upon Mrs. *Seaton's* petition, a decree *nisi* had been made for the dissolution of her marriage on the ground of her husband's cruelty and adultery—and the decree was made absolute on the 14th of November, 1882.

Pursuant to an order made on the 17th of April, 1886, in the suit (*Buckmaster* v. *Buckmaster*), declaring that the testator's estate was divisible in tenths—one-tenth of the fund in Court, representing such estate, was carried over to the credit of Mrs. *Seaton's* share "alleged to be settled" by the settlement of 1863. The sum so carried over amounted to about £20,000.

Mrs. *Seaton* presented this petition asking that the share so carried over might be transferred to her, or, in the alternative, that the income thereof might be paid to her until further order.

The Vice-Chancellor held that either under the inherent jurisdiction of the Court over its wards—or under the provisions of the *Infants' Settlement Act*, 1855, the reversionary interest of Mrs. *Seaton* was bound by the settlement notwithstanding that it was not reduced into possession during the coverture—and made an order according to the alternative prayer of the petition.

His Lordship also was of opinion that Mrs. *Seaton* had confirmed the settlement by her conduct. The facts relied on for this purpose are stated at length in the report below, and are also referred to in the judgment, and need not be repeated here.

Mrs. *Seaton* appealed.

Fischer, Q.C., and *B. B. Rogers*, for the Appellant:—

Apart from the *Infants' Settlement Act*, the Appellant, being a married woman, could not assign her reversionary interest in personal estate so as to bind her right by survivorship. *Malins' Act* (20 & 21 Vict. c. 57), has no application to the present case, as the instrument conferring the interest was made before that Act. Consequently no assignment either by herself or her husband, even for value, could bind her if she survived her husband: *Purdew* v. *Jackson* (1); *Simson* v. *Jones* (2); and dissolution of the marriage is, for this purpose, the same thing as the death of the husband: *Wilkinson* v. *Gibson* (3).

If, then, Mrs. *Seaton* had been of full age when she executed this settlement, it would have been ineffectual—and the fact that to the disability of coverture was added the disability of infancy cannot give the settlement any further validity.

The Court has no jurisdiction to compel its ward to settle her property either by way of punishment for contempt, or provision for her benefit: *In re Murray* (4); *Field* v. *Moore* (5). It can forbid the marriage until its ward attains twenty-one, and,

(1) 1 Russ. 1.
(2) 2 Russ. & My. 365.
(3) Law Rep. 4 Eq. 162.
(4) 3 D. & War. 83.
(5) 7 D. M. & G. 691.

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for the purpose of excluding the man who has improperly married a female ward of Court, and who would by reason of marriage become possessed of her property, from those rights which the law would give him, can compel him to make a settlement of his wife's property, and it is only the right of the husband that the Court can touch; the children have no right as against their mother: *Hodgens* v. *Hodgens* (1).

Then the *Infants' Settlement Act* does nothing but remove the incapacity of infancy—it leaves untouched all other incapacities, *e.g.*, coverture and lunacy. Having regard to the decision in *In re Sampson & Wall* (2), that the Act includes post-nuptial settlements, a married female infant can do all that a married adult could, *i.e.*, she could by deed duly acknowledged convey real property under the *Fines and Recoveries Act*, and in a case falling within *Malins' Act* could convey a reversionary interest in personalty. It would be a strange thing if the Legislature, when expressly providing for the disability of infancy, should without a word abolish the greater disability of coverture. But it is clear from the terms of the Act that such a thing was never intended. The operative part of sect. 1 enlarges the capacity of the infant, and therefore requires the sanction of the Court, so that the infant, who makes a settlement, should make a proper one, but the jurisdiction of the Court is not enlarged. The whole of sect. 1 must be taken as one enactment, and is not to be broken up into two parts, the first part down to "expectancy" being treated as a substantive enactment; but, reading the whole section, the result is that the infant is to be considered as if of full age, and the Act authorizes the infant (whether single or married) to do what if of full age he or she could do: *Tootal* v. *Dickenson* (3).

It is to be observed that in *In re Sampson & Wall* the property was at the infant's own disposal. There was no disability of coverture (4).

The settlement did not bind Mrs. *Seaton* in its inception, nor has anything done since given it validity. She could not be bound by acquiescence during her coverture, and the applications in the Divorce Court had reference to the sum of £5000 which

(1) 4 Cl. & F. 323, 372.
(2) 25 Ch. D. 482.
(3) *Seton*, 4th Ed. p. 763.
(4) See *per Kay*, J., 25 Ch. D. 488.

had been reduced into possession during the coverture, and was consequently bound by the settlement.

Marten, Q.C., and *T. L. Wilkinson*, for the four children of Mrs. *Seaton*:—

Mrs. *Seaton* had power with the sanction of the Court to make this settlement. The way to read the Act is to ascertain the meaning of each clause in order.

The Legislature intended to give to infants the widest possible power of making settlements and contracts—and the Act expressly authorizes the settlement of reversionary property. Then the draughtsman introduced the words contained in the 2nd clause of sect. 1 to obviate any difficulty that might arise with reference to the particular deeds necessary to carry the settlement into effect, *e.g.*, a conveyance of real estate upon trust for sale. And as a post-nuptial settlement is within the Act, the result is that the Act gives power to make a settlement and to execute the deeds necessary to complete it (with the exception of the cases in this proviso), in the case of a married woman infant in the same way as a spinster of full age. This Act was in fact as regards infants an anticipation of *Malins' Act.*

[On the question of confirmation they relied on the same arguments and cited the same cases as in the Court below, and, in addition, referred to *Wigney* v. *Wigney* (1).]

Millar, Q.C., and *Brabant*, for the surviving trustee of the settlement.

COTTON, L.J.:—

The sum of £20,000 in Court which the Appellant asks to have transferred out of Court to her was the residue (after deducting a sum of £5000) of a provision made for her by the will of her father who died in 1848, subject to a life interest therein of his widow. During her mother's lifetime, and consequently while this fund was still reversionary, she, being a ward of Court, married without the leave of the Court a Mr. *Seaton*. No settlement was executed previously to the marriage, but after the marriage the

(1) 7 P. D. 228.

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usual reference to Chambers was made to inquire whether there had been a valid marriage and to approve of a proper settlement, and an order was made that Mr. and Mrs. *Seaton* should execute it.

The case has been much dealt with in argument, and also, I think, by the Vice-Chancellor, as if the present Appellant were coming here asking to be relieved from that settlement. That is not the view that I take of this case. She is coming and saying, "Here is a large fund in Court which belongs to me and I ask to have it transferred to me, who am the person entitled under the will of my late father." Before this application was made she had obtained a divorce from her husband for his misconduct, and, therefore, when she made the application she was to all intents and purposes a *feme sole*, and this reversionary interest which had not fallen in till after the divorce was property to which she became entitled when a *feme sole*, just as if she had survived her husband, and which is hers unless she has deprived herself of the right to it. It was said in answer to her application, that this was not her money; but that it was assigned and bound by the settlement which had been approved by the Court and executed by Mr. *Seaton*, and also by the present Appellant when she was not only an infant but also a married woman. As a married woman of course she had no power during coverture to dispose of this reversionary interest in personal estate, so as to defeat her right by survivorship if she survived the coverture and the fund were not reduced into possession. Her husband had power to deal with it if he became entitled to it by his marital right, if it fell into possession during the coverture.

Reliance was chiefly placed upon the *Infants' Settlement Act*, 1855 (18 & 19 Vict. c. 43). A question which had formerly arisen on the Act, whether the Act applied to post-nuptial settlements or not, we must now treat as decided in the affirmative by the judgments of Earl *Selborne* and *Fry*, L.J., in the case of *In re Sampson and Wall* (1). But the question which we have to consider is whether that Act does more than remove the disability of infancy; *i.e.*, does it enable a married woman because she is also an infant to dispose of that which if adult she could not have disposed of, namely, a reversionary interest in personalty? In

(1) 25 Ch. D. 482.

my opinion it does not. The question turns on the true construction of the first section: "From and after the passing of this Act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal." Then follow words which have been very naturally much relied on, "and whether in possession, reversion, remainder, or expectancy." Stopping here of course it looks as if a general power were given to infants to dispose of all property of this description; but then, even stopping there, I think the question would still arise whether the section did more than enable an infant, notwithstanding infancy, to dispose by way of settlement upon or in contemplation of marriage of property which the infant, if adult, would have been capable of binding. My own view would be that it did not intend to do more than remove the disability of infancy, it did not intend to confer a special power on a person, because an infant, to dispose of property which otherwise could not be disposed of by that person if adult: or, to give an example, to get rid of the requirements of the *Fines and Recoveries Act* and enable an infant married woman to dispose of real estate without observing the requisitions which were imposed by that Act on a married woman. A great part of the argument pressed upon us on behalf of those who resist this application was to stop short at the word "expectancy" and to treat that part of the section ending there as a substantive enactment by itself. But in my opinion, even treating that part as a substantive enactment, as to some extent no doubt it is, it would be wrong to construe it without reference to the rest of the section; because in construing an Act of Parliament, or any other instrument, it is not right to look only at one particular passage, but we must also look at it in connection with the rest of the particular section in which it occurs to see whether the rest of the section, as in the case of a deed the rest of the deed, enables us to construe the meaning of the particular clause in question. But then the section goes on, "And every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assign-

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ment thereof, executed by such infant, with the approbation of the said Court, for the purpose of giving effect to such settlement shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years." I think that the explanation suggested by Lord Justice *Lindley* of these words is the probable one, that is, that these words were intended to deal with those assignments or conveyances of the property settled which are frequently made separately from the declaration of trust, so as to deal with the case where there are two instruments of settlement; one a conveyance of the property, and the other a declaration of trust of the property so conveyed. In this case there is only one deed, which includes an assignment (or what purports to be an assignment) of the property by the husband and the wife, and also the declaration of the trust on which it is to be held. But when we see from the latter part of the section referring particularly to an assignment, if distinct from the instrument of settlement, that this assignment is only to have the same effect as if it had been executed by an adult, "as valid and effectual as if the person executing the same were of the full age of twenty-one years," it is impossible to say that the previous part of the section is to be read so completely as a separate enactment that a settlement made in pursuance of it is to have a greater effect than is given to the conveyance or assignment of the property which is a part of, or necessary for the carrying into execution of, the instrument containing the declaration of trust. The whole of the section is really one enactment, as, I think, is shewn by the proviso which follows: "Provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant." The first part of the section refers to property over which the infant has a power of appointment as well as that which is the infant's own property. The proviso refers therefore to the first part of the section, and refers not only to that but to the concluding part of it—it treats the whole section as, in my opinion, it ought to be treated, as one enactment.

It should also be remembered that although there are these words "in possession, reversion, remainder or expectancy," the section is dealing not only with female but also with male infants;

and after marriage a male, when once the disability of infancy is removed, can dispose of his reversionary interests; and even in some cases a woman may—because if the reversion or remainder is settled to her separate use, she has power notwithstanding coverture to dispose of it as if she were a *feme sole*, and therefore all these words, notwithstanding our decision that the Act does not enable an infant to dispose of property of which, if adult, she could not dispose, will have a reasonable and sensible construction.

In the case of *In re Sampson and Wall* (1) it must be remembered the post-nuptial settlement directed to be executed was one of property settled to the separate use of the married infant, and therefore the decision of Earl *Selborne* and Lord Justice *Fry* in that case is no authority in favour of the contention which is raised by the Respondents on this appeal, that this settlement, although executed by a married woman—of a reversionary interest in personalty—was by reason of this Act valid and effectual and bound the interest when it fell into possession after the determination of the coverture.

Then, although it was hardly argued here, I think that as the Vice-Chancellor relied very strongly on the inherent power of the Court of Chancery to deal not only with its wards but with their property, it will be proper for us to dispose of that part of the case. How has the Court of Chancery power to bind the property of its wards? There is no Act of Parliament which empowers a forfeiture of the property of an infant ward of Court who marries without leave. The Court, in my opinion, has no authority or power to impose such a penalty on a ward who so marries as the taking away of his or her property. If the Court can make a valid and effectual settlement of its ward's property it is, in fact, taking away that property, taking away the absolute interest from the ward who marries and giving it to the children, because those are not the same persons as the ward, although it may be probably for the benefit of the ward that provision should be made for the future children of the marriage, and, in my opinion, it would be assuming an autocratic power which the Court of Chancery never possessed and which the High Court does not possess, if,

(1) 25 Ch. D. 482.

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without any statutory authority it were to impose on a ward who marries without its consent the penalty of binding the property of the ward in such a way as to deprive such ward of it. Mr. *Fischer* has referred us to the case of *In re Murray* (1) before Lord *St. Leonards*, where the question whether the Court had such a power arose. There, an infant ward of Court, a male, having married without leave, the Lord Chancellor was applied to to enforce a settlement of his property. I will not read the judgment, but in it Lord *St. Leonards* disclaims any power so to deal with the ward's property, or to compel the ward to execute a settlement, and that is in accordance with the view expressed by Lord Justice *Turner* in *Field* v. *Moore* (2), where, the settlement having been executed, he held that it was inefficacious to bind the heir-at-law of the infant ward.

But it is said that it is always the course of the Court to order any one who marries a ward of Court without leave to execute a settlement. Why and how? The Court prevents the husband, who has come into that position, and who would have acquired the rights of a husband but for the interference of the Court, from gaining any benefit by his wrongful act of marrying a ward of Court without leave. It is contempt, and the Court dealing with it as a contempt enforces upon the husband who has married without leave the necessity of giving up all the rights which he would otherwise acquire on that marriage, which was celebrated by him in contempt of the Court. But it has never been the practice to order a ward of Court who has been married to some one without the sanction of the Court to give up his or her property. In my opinion, therefore, that contention cannot be supported, and we must treat this settlement as one which at the time of its execution was ineffectual in any way to bind this reversionary interest.

Under a power of advancement in the father's will a sum of £5000, the life interest wherein the mother gave up, was, long before the divorce, with the assent and knowledge of the then Mrs. *Seaton*, transferred to the trustees of the settlement. That is said to have been a confirmation of the deed, but at that time she was a married woman and as such incapable of dealing with

(1) 3 D. & War. 83. (2) 7 D. M. & G. 691.

the interest which she might acquire by survivorship, and I cannot see how, allowing that sum to be transferred to the trustees of the settlement, when, if not so transferred, it would become the property of the husband, can be looked upon as in any way making effectual, as against her, a settlement of the interest which, after the marriage was dissolved, she had in the property which came to her as a *feme sole*. Had a case of election as between the wife and husband been raised, had it been urged that she on that occasion took advantage of the settlement by requesting her husband to give up that which otherwise would have been his own property, and was now seeking to deprive him of any right he had acquired under the settlement by this fund falling into possession, I could have understood the argument that as between herself and her husband she had bound herself by taking advantage of the settlement. But, as between herself and the Respondents there can be no such question of election.

Then what was chiefly pressed upon us and was probably the most important matter to be considered was this—there were proceedings of two kinds in the Divorce Court; first for a judicial separation, and afterwards for a divorce, wherein the Appellant obtained a decree for the dissolution of the marriage. After the decree the Appellant petitioned the Divorce Court to deal with the settlement under the large powers conferred on that Court, and also asked personally to be relieved from a payment to her husband of a sum of £120 a year, which she had been ordered by the Court to pay to him when she obtained the decree of judicial separation. It is said that by that proceeding and the order which she took, she confirmed the settlement which up to that time I treat as not in any way binding upon her. There is not here, in my opinion, any question of acquiescence. If there is an instrument which is binding until set aside acquiescence is most important; but the instrument in this case, unless it has been validated and made binding by any subsequent act of this lady after becoming *sui juris*, is inoperative to bind the reversionary interest which she now claims. We have not, therefore, to deal with the ordinary question of acquiescence, which prevents a person from afterwards raising, as against an instrument, or as against any act done, the right, not of saying that the instrument is inoperative,

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but of claiming to be relieved from a fetter put upon him or her by the instrument. The Appellant here says: "No fetter is put upon me by this instrument;" and, in my opinion, she is right in so saying. But what did she do? She presented a petition, and that petition, and the report of the Master made upon it, did undoubtedly refer to this settlement, and stated it in full. It did not raise the point now raised whether or not she was bound, as regards so much of the trust fund as had not fallen into possession during the coverture, by the advance made by the trustees of the will to the trustees of her settlement. On her petition she represented that she had something like £300 a year, and an order was made relieving her from paying the £120. A variation was then made of the settlement, and the husband was ordered to pay to her for the maintenance of her two younger children £125 a year until further order. It is said that that amounted to a recognition of the whole settlement as binding. In my opinion it did nothing of the kind, and I entirely omit all evidence as to whether she knew of her rights or not. Her application to the Court related solely to this—her late husband had a joint power of appointment with her over the funds in settlement between the children. As a matter of fact, there was at that time a sum of £5000 or thereabouts subject to the trusts of the settlement, and the joint power would apply to that sum. In her petition she recited the settlement, not as admitting that the whole of this £20,000 was subject to it, but for the purpose of shewing to the Court what income she at the moment had. It is very true that she made no mention of the fact (even if she knew it) that she could claim the whole of this £20,000. The only question, then, before the Court was in what manner this settlement, which as to some of the property did bind her, ought to be varied, what income she had, so as to enable the Court to determine whether she should continue to pay the £120 a year to her late husband, and whether he ought to do anything to provide for the younger children. If, knowing that she was not bound by the settlement, she had done that which amounted to a declaration of trust of the £20,000 now in question, that would have been effectual to bind her, but there is nothing of the kind. Neither her petition nor the report of the Master, nor any of the

proceedings, in any way pointed to a declaration of trust of this property, or as imposing on it any fresh fetter or any formal trust, but there is merely a recital of a settlement which, as I say, was valid, because as regards the £5000 it was the settlement of the husband and binding on him, and her then income was in fact derived under the settlement. I think those proceedings could not be treated as anything done by her making binding upon her that deed which up to that moment was ineffectual to pass this property.

But it is said that asking to vary an instrument recognises it as binding. To my mind there is a fallacy in that statement. If there had been no property whatever subject to this settlement the difficulty would have been greater, but, in fact, there was £5000 subject to it, and asking to vary the settlement, although an admission that there was a settlement of a sum of money to be dealt with, did not amount to a fresh execution by her as if she, being a *feme sole* again, had signed, sealed, and delivered this deed, so as to make this assignment operative, not only as against her husband, which it clearly was, and had as such been acted upon, but to make it her own deed—for we must remember that, as regards this reversion, it is no question of a voidable instrument; as against the lady the instrument is null and utterly inoperative unless she has done that which, while not amounting to a confirmation, because there was nothing to confirm, gives validity *de novo* to an instrument which up to that time had, as regards her, no force.

It is further said that if the facts had been known the payment by the husband to her of £125 per annum for the maintenance of her children ought not to have been ordered. That order only provided for what ought to be done so as to meet her necessities while her income amounted only to between £300 and £400 a year, and I think the Court would have acted wrongly if it had directed a sale of the reversionary interest. I am not going to attempt to bind the Divorce Court or to dictate what it ought to do, but it is obvious that an application might be made to that Court, under the altered circumstances of the case, for the purpose of relieving the husband from his payment. It might have been made when the reversion fell in, even if it had been bound

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by the settlement, on the ground that the late wife had a much larger income than when the order was made, and that therefore, as the order was only until further order, the amount ought to be reduced. But in my opinion the fact that the amount ordered to be paid by him might be too large a sum to be required under the altered circumstances, does not give the order, which, under the then existing circumstances, was rightly made, the effect of making the settlement binding upon the Petitioner here.

The Petitioner, therefore, coming here simply to ask that property which fell into possession after the dissolution of the marriage should be given to her, is, I think, asking for what she is entitled to, and there is no effectual bar or obstacle to the granting of that relief to her. In my opinion the order of the Vice-Chancellor should be reversed and an order made, in accordance with the first prayer of the petition, which asks for a transfer out of Court of the whole fund.

LINDLEY, L.J.:—

I have come to the same conclusion.

This marriage took place in 1862, after the passing of the *Infants' Settlement Act*, which came into operation in 1855. If this settlement had been executed before the marriage, there is no doubt that it would have been operative as to this reversionary personal estate; for the lady would have been subject only to the disability of infancy, and the Act of Parliament having got rid of that disability, she could have made a valid settlement. Had she done that which she ought to have done, this settlement would have bound her reversionary interest in the personal estate in question. But she did not; she married first, and this settlement was made after marriage, and a considerable difficulty arises. The first point to consider is whether, by reason of the *Infants' Settlement Act* itself, the settlement made by her after marriage bound this reversionary interest in personal estate. If we look at the Act alone, it appears to me to be impossible to come to the conclusion that the Act removed any disability except that of infancy. I think it is plain from the whole of the Act, whether read as a whole or in portions, that its object is to deal with the incapacity of infants—it has no other object, either expressed or to be gathered from its language; and although it is

very true that it has been decided in *In re Sampson & Wall* (1) that the Act relates to settlements made upon the occasion of marriage, even although made after the marriage, neither that decision nor any other warrants the inference that the Act is applicable to or has any reference to any incapacity except that of infancy.

The first clause of sect. 1 (which is the governing section of the Act) is expressed in general terms which, if there were no preamble and no subsequent clause, would be extensive enough to bind all the interests of the infant, and perhaps even reversionary interests of female infants who had just married. I do not say that it would. But when we come to look at the preamble and the words which follow the first clause of sect. 1, it is quite obvious that the Legislature was then dealing with the incapacity of infants, and that alone. The second clause in sect. 1 leaves no doubt at all about it, and it is important as shewing more plainly than the preamble what the Legislature was about. It was not dealing with married women, but with infants only. We see this expressed, in language which is quite unmistakeable, in the clauses which relate to the conveyances and so on made with the approbation of the Court for the purpose of giving effect to such settlements. They are to be as valid and effectual as if the person executing the same were of the full age of twenty-one; there are no words applicable to any other incapacities, such as lunacy, coverture, and so on. At first I did not see the meaning of that clause, and it was not until Mr. *Wilkinson* pointed it out that I appreciated it. I think I understand it now. The first clause relates to settlements. Then it occurred to the draughtsman that a settlement is often made by more than one instrument. There is a conveyance of real estate to trustees, and the actual settlement is in a different deed which declares the trusts on which they are to hold the property, and therefore it is desirable not only to say that the settlement shall be binding, but also to say that these other deeds which are executed for the purposes of the settlement shall be as binding as if the person executing was twenty-one years of age. That is the object of these words. Just see what a difficulty we should be in if we were to construe this *Infants' Settlement Act* as desired

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by the present Respondents. It would be ridiculous to hold that the effect of the Act depended on whether the settlement was in one deed or two; that cannot be. Suppose, for example, that this settlement had been comprised in two deeds, one an assignment by the young lady of her reversionary interest to trustees, and another a deed declaring the trusts of the property so assigned; according to the argument which has been addressed to us, we should have to hold the settlement valid although she is a married woman, but the assignment of the property invalid because she is a married woman. That would be absurd. We must be consistent; either give an effect to both deeds, which, as regards one, is in the teeth of the Act of Parliament, or give that effect to both which the Act intended and which renders the whole Act consistent from beginning to end, and say that the Act of Parliament was directed to the incapacity of infancy and no other. That appears to me to be the true construction of the Act of Parliament.

The next point to which I allude is this. It occurred to me at one time that there might be a method of upholding this settlement upon the ground that, considering the circumstances under which it was executed, considering that it ought to have been executed before marriage, and that it was executed in obedience to an order of the Court after marriage, it might be right to hold it to be as effectual as it would have been if it had been executed when it ought to have been executed. In other words, it might be right to hold that although the settlement was executed after marriage it ought to have been held as effectual as against the infant, as if she had executed it when she ought to have done so. At one time I felt a little difficulty about it, but the cases referred to by Mr. *Fischer*, especially the case of *Field* v. *Moore* (1), have removed all difficulty as to that point. Those cases have satisfied me that the Court could not, in exercising any jurisdiction that it has ever exercised, have forced the ward to execute this settlement before marriage. The Court would have said, If you do not choose to execute the settlement, we shall prohibit the marriage until you are twenty-one; and that is the utmost the Court could have done; but the

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Court could not have compelled the ward to have executed such a settlement as this before marriage. If so, I do not see on what ground we can hold that a settlement after marriage ought to be treated as if it had been executed before, the Court having no power to force a ward to execute it. A reference to these two cases, and especially to the very instructive judgment of Lord Justice *Turner* in *Field* v. *Moore* (1), has satisfied me that we cannot treat this settlement as executed at any other than the actual date of its execution. Accordingly it appears to me impossible to hold that this settlement was binding on the lady as regards her reversion, the reason being that she was not only an infant but that she was a married woman, and although as an infant she was free from disability by reason of the Act of Parliament, the other disability which arises from coverture renders the deed wholly inoperative. I wish to add that I mean by "wholly inoperative" actually void, and as such not binding on her at all —it was incapable of ratification, incapable of confirmation.

That becomes important in considering what took place afterwards. It is said that, at all events, circumstances have occurred since the marriage and since the execution of the settlement which have rendered it binding on her. The first point alluded to was what took place in 1873, when the mother made a present, in fact, to the trustees of £5000, part of this reversionary interest, and introduced it into the settlement. That was concurred in by the lady. What was the effect of that? As regards the £5000, I take it it was a new disposition by everybody of that money, and to that extent the settlement appears to me to have become binding on everybody. This sum of £5000 was reduced into possession by the act of the mother and by the consent of the husband. It was bound by and held on the trusts of the settlement. But when we come to look further and see whether what took place then became a new disposition of what was left of this reversionary interest, I fail to see any sign of anything of the kind. In the first place, be it remembered, that it was not competent to this lady then to make a new disposition of her reversionary interest in her personal estate; she was as incapable then of making any fresh disposition of it as she was

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when she originally made the settlement. After the lady obtained her divorce she became *sui juris*, she was removed from the incapacity of coverture, and then it did become competent to her, I do not say to confirm the original settlement, but to make a new disposition, or so to recognise the existence of the settlement as to make it a new settlement. If she had done anything with that intent, if that had been the object, or even the inevitable and necessary consequence of what she was doing, she might be held to be bound by that settlement, not on the ground of ratification or otherwise, but on the ground that she had in effect made a new disposition of property of which she was at that time capable of disposing. When we come to examine what she did, for the reasons given by Lord Justice *Cotton*, which I need not repeat, it seems to me perfectly impossible to say that she made any new disposition of her reversionary interest in 1882 and 1883 when she presented a petition to the Divorce Court for the sole purpose of excluding her husband from the power of appointment which she had both as to the £5000 then the subject of the settlement, and as to the reversionary interest. The reason why I say it is impossible to hold that what she did then was a new disposition, is this, that she did not know of the fact that she had any right to do it, and whether she knew it or not, it never was present to her mind or to the mind of anybody else; no one dreamt that she was doing any such thing, and it would be a strong thing to say that what she did then amounted necessarily and by inference of law to a settlement or new disposition of her property. Besides which, for the reasons given, I do not see how we are driven by any logical necessity to hold that she so conducted herself as to make a new disposition of the property against her intention or without any intention so to do. It appears to me that for the reasons I have given the property in question has never ceased to be hers, and that she is entitled to it. The appeal will therefore be allowed, and the ordinary consequences must follow.

LOPES, L.J.:—

I am of the same opinion. It is important in this case to consider the law with regard to married women and infants at the

date of the passing of the *Infants' Settlement Act*, 1855. At that date the wife's reversionary *chose in action* at the time of the marriage or accruing during the marriage, vested in the husband subject to the right of the wife by survivorship if it was not reduced into possession. The husband and wife together could not, nor could either separately, dispose of her reversionary personal property, legal or equitable, so as to bar her right by survivorship, and this was the case whether the married woman was an infant or adult. Now that was the law with regard to married women up to 1855. Down to 1855, when the *Infants' Settlement Act* was passed, no infant, either male or female, could make any valid settlement of his or her property, and it was to remove this defect in the law that that Act was passed. Two years after the passing of that Act, the 20 & 21 Vict. c. 57 (commonly called *Malins' Act*) was passed, which enabled a married woman to dispose of her reversionary interest in personal property in the way provided for by that Act. The important question raised in this case—the only important question—is what is the true construction of this *Infants' Settlement Act*, 1855. It has been contended by the Respondents that it removes not only the disability of infancy, but also the disability of coverture in respect of a married woman's disposition of her reversionary personal estate; that, in fact, in the case of a female infant it anticipates the provisions of *Malins' Act*, and enables an infant married woman to do that which an adult married woman could not do until the passing of *Malins' Act*, and then only when the husband concurred and the deed was acknowledged pursuant to the 3 & 4 Will. 4, c. 74, s. 2. I am clear that this contention cannot be maintained. All the *Infants' Settlement Act* did was to remove the disability of infancy; it enabled infants to do what adults could do with respect to settlements on their marriage subject to certain safeguards provided by that Act. It, in fact, enabled an infant, with the sanction of the Court, to make the same settlement on marriage as an adult could make, but it did nothing more. The infant could not settle property except as an adult could; a married female infant could not deal with her reversionary *chose in action* except as an adult married woman could. To my mind, and I have entertained a strong view of the matter from the first, the Act is

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simple and clear in its language, and no arguments which have been adduced have thrown any doubt upon that which is the true construction of the Act, which is that which I have just stated. The case of *In re Sampson and Wall* (1) was referred to during the argument. That case has established that this *Infants' Settlement Act* applies not only to ante-nuptial but also to post-nuptial settlements. That is a decision which the Court cannot question, and it is not for me to express any opinion with regard to the propriety of that decision. That being the case this settlement was, with regard to any reversionary personal interest of the wife which was not reduced into possession during the coverture, inoperative and void.

But then there was another contention. It was said that independently of that Act there was an inherent jurisdiction in the Court of Chancery that justified the Court in binding the property of its ward. It must be recollected that neither before nor after marriage can the Court of Chancery compel an infant ward to execute a settlement. It can only refuse to sanction the marriage during the minority of the infant ward. There is no authority, so far as I can see, for this contention of the inherent jurisdiction in the Court. There is no authority for the proposition that the Court has power to impose upon a female ward who has disobeyed the order of the Court the penalty of taking away from her a power of disposition over her property, which under certain circumstances would belong to that ward. That is a contention, I think, which cannot be supported.

But it was also said that independently of the *Infants' Settlement Act*—independently of this alleged inherent power of the Court—in this particular case the lady had by her conduct confirmed this settlement. According to my view, there is no ground whatever for this suggestion. There is a very short and simple answer to it beyond other matters which might be suggested; that answer is this, that the settlement being void could not be confirmed. It was also suggested that after the divorce there was some new disposition of this property by the married lady. I quite agree with what has been said by Lord Justice *Lindley*. I am clear that there is no ground for that contention. The lady

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did not know her rights, and, what is more important still, there is not the slightest ground for suggesting that she ever intended to make any new disposition of the property in question.

For all these reasons, I am of opinion that this appeal should be allowed.

Solicitors for Appellant: *Purkis & Co.*
Solicitors for Respondents: *Hadden Woodward & Co.*
Solicitors for trustee: *Caprons, Daltons, Hitchins & Brabant.*

M. W.

In re HOTCHKIN'S SETTLED ESTATES.

[1886 H. 4844.]

Settled Land—Permanent Improvements—Payment of Cost out of Capital Money—Approval of Scheme by Trustees—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 25, 26.

In order that the Court may sanction the expenditure of "capital money" under the *Settled Land Act*, in payment of the cost of permanent improvements to the settled estate, a scheme for the proposed works must be submitted by the tenant for life to the trustees, before the works are commenced. If the tenant for life executes the works at his own expense, without first submitting a scheme to the trustees and obtaining their approval, the Court cannot then authorize the repayment of the cost out of "capital money."

Decision of *North*, J., affirmed.

Held, by *North*, J., that the Court will not hear counsel for the trustees of a settlement in support of an application by the tenant for life when his interest is opposed to those of the remaindermen, it being the duty of the trustees to act as a check upon him.

Whether the expense of improvements on lands which have been sold, and so are no longer comprised in the settlement, can be afterwards paid out of capital money, *quære.*

SUMMONS by the trustees for the purposes of the *Settled Land Act*, 1882, of the settlement made by the will of *Thomas Hotchkin*, of an estate situate at *Woodhall*, in the county of *Lincoln*, asking that they might apply the sum of £141 10*s.* 4*d.*, money in their hands, liable to be laid out in the purchase of lands to be made subject to the settlement, in payment for substantial and permanent improvements executed at a well of mineral water situate

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on the estate, pursuant to a scheme approved of by the trustees under the Act.

The well was occupied with an hotel, which was known as the *Victoria Hotel and Spa.* In the latter part of the year 1885 the tenant for life being about to sell the estate, it became necessary to make improvements about the well in order to prevent surface water from running into it. Dispatch being considered desirable, the works were executed by the direction of the tenant for life, without any previous consultation with the trustees, and after they had been completed he submitted to the trustees for their approval a scheme which they approved.

On the 12th of June, 1886, a contract was entered into for sale of the hotel and spa at a very good price, and the sale was completed on the 29th of September, 1886.

The trustees, in December, 1886, took out the above summons. The works had not been paid for.

The summons came before Mr. Justice *North* in Chambers, and he dismissed it, on the ground that the approval of the scheme by the trustees ought to have been given before the execution of the works.

The tenant for life moved before Mr. Justice *North*, on the 31st of January, 1887, that the order made in Chambers might be discharged, and an order made as asked by the summons.

F. T. Procter, for the tenant for life :—

The payment of the cost of this improvement out of "capital money," is authorized by sect. 26 (1), and it is immaterial whether

(1) Sect. 26 "(1) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, shewing the proposed expenditure thereon.

"(2) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

"(i.) A certificate of the Land Commissioners certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for

the scheme is approved by the trustees before or after the execution of the work. The only thing which is material, is that the application should be made to the Court before the "capital money" is expended. It is sufficient if the Court is satisfied before the payment of the money, that the works have been properly executed according to a scheme approved by the trustees. If it is essential, in order that the cost of the works should be paid out of "capital money," that the proposed scheme should be approved by the trustees in the first instance, irremediable injury might in some cases be done to the settled land before the approval of the trustees could be obtained, *e.g.*, it might be impossible to construct a sea wall or a river bank (which works are among the improvements authorized by sect. 25 to be made with "capital money"), in time to prevent a threatened inundation.

J. T. Dodd, for the trustees, desired to address the Court in support of the motion.

NORTH, J.:—I decline to hear counsel for the trustees in support of the application of the tenant for life. I think the trustees ought to hold an even hand, if they have nothing to say against this application.

NORTH, J.:—

For the present purpose I will assume that the work which has been done is an improvement, the cost of which might properly have been defrayed out of capital money, if the tenant

any payment made by them in pursuance thereof; or on

"(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

"(iii.) An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

"(3) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the Court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement."

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for life had first applied to the trustees and obtained their approval of a scheme for the proposed work. Instead of doing that, he had the work executed at his own cost, without consulting them, and after the work had been completed he submitted a scheme to them for their approval. If a tenant for life desires to have the cost of improvements to the settled estate paid out of capital money (the cost of which, it must be remembered, would before the Act have fallen upon him), he must pursue strictly the course which is pointed out by sect. 26. It appears to me that it is intended by that section that the approval of the scheme by the trustees or the Court (as the case may be) should be asked for in the first instance, so that they may be satisfied whether the proposed improvement is one the cost of which ought to be paid out of capital money, and that it is only after this has been done that the tenant for life can expend the money with the certainty of repayment out of capital money. It is very important that the provisions of the Act should be observed. Before the cost of the work had been incurred the trustees would be in a position to exercise their judgment freely and independently, but, after the tenant for life had expended the money, it might seem a harsh and invidious thing to refuse to approve what had been done, and thus to prevent him from obtaining repayment. I do not think it was the intention of the Act that either the trustees or the Court should be placed in that position. It was only intended to authorize the payment out of capital money of the cost of works executed in pursuance of a scheme which had been previously approved either by the trustees or the Court. The amount expended in the present case is but small, and I think the tenant for life could have obtained repayment of it out of "capital money" if he had taken the proper steps, but, as he has not done so, I can only refuse the application.

I declined to hear the trustees' counsel in support of the motion. In my opinion trustees are appointed in order that they may act as a check upon the tenant for life in the interest of the other persons who are entitled under the settlement, and they ought not to attempt to support the tenant for life especially when his interest is opposed to that of the remaindermen.

W. L. C.

The tenant for life appealed, and the appeal was heard on the 23rd of February, 1887.

F. T. Procter, for the Appellant:—

The improvements in this case were made with a view to the advantageous sale of the property, and it has been sold to very great advantage. They are clearly improvements within the Act, sect. 25, sub-sects. xiii. and xx. It was feared that surface water would leak into the mineral spring, and the works in question were done to prevent this, which would have been most prejudicial to a sale. A doubt was raised in *In re Broadwater Estate* (1) whether past expenditure could be sanctioned, but the point was not decided. I submit that the only material question is whether the expenditure is of a proper kind, and has been beneficial to the estate. This case is distinguishable from the *Broadwater* case, for here the expenditure is "proposed expenditure," inasmuch as although the work has been done it has not been paid for. Sect. 26 has the word "may," not "must" or "shall," it is therefore permissive merely, and the Court is not bound to hold the submitting of a scheme to be a condition precedent. Under the ordinary jurisdiction, whenever a trustee has incurred expenditure which the Court would have authorized he is allowed it. The estate gets the value of these repairs in the increased price obtained for the property, and they ought to be allowed. Past expenditure has repeatedly been allowed under a statutory jurisdiction: *Ex parte Rector of Gamston* (2); *In re Aldred's Estate* (3); *Ex parte Rector of Holywell* (4); *Re Partington's Trust* (5).

J. T. Dodd, for the trustees:—

The trustees are satisfied that the improvements were beneficial and that it was desirable to carry them out at once without any publicity.

COTTON, L.J.:—

This is an appeal by a tenant for life from a refusal of Mr. Justice *North* to apply capital moneys arising under the *Settled*

(1) 54 L. J. (Ch.) 1104.
(2) 1 Ch. D. 477.
(3) 21 Ch. D. 228.
(4) 27 W. R. 707.
(5) 11 W. R. 160.

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Land Act in payment of the expenses of permanent improvements of the settled estate. There was a mineral spring on the settled land, and it was proposed to sell the estate. The surveyor employed by the tenant for life advised that, with a view to the sale, it was desirable to effect certain repairs and improvements round the spring. The work was done by the tenant for life at an expense of £141 10*s.* 4*d.* without any scheme being laid before the trustees, and the estate was afterwards sold at a very good price. I think that the work was an improvement authorized by sect. 25 of the Act, sub-sect. xiii. expressly applying to wells, and sub-sect. xx. extending to improvements of them. But that does not settle the question whether we can now authorize the trustees to pay these expenses out of the moneys arising from the sale. I feel great doubt whether the Act empowers us to authorize the trustees to pay out of capital money the expense of improvements on lands which are no longer in settlement. I do not, however, give any opinion on that point, as the appeal must in my opinion fail on another ground. In my judgment it is required by sect. 26 that a scheme should be laid before the trustees and approved by them before the work is done. The 1st sub-section of that section says: "Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act, he may submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement shewing the proposed expenditure thereon." The language is permissive; the tenant for life is not bound to make any improvements, but if he wishes to make them at the expense of the estate he must submit for approval a scheme shewing the proposed expenditure. It is putting the trustees and the Court in a wrong position, to come for the first time after the work is done, and ask to have it approved and paid for. It is true, that under the *Lands Clauses Consolidation Act*, the Court has sometimes adopted works which had been done without its previous approval, and ordered payment for them, but there no specific directions are given as to the course of proceeding. Here we are acting under a statutory power and must see that the requirements of the statute are

strictly followed. I am of opinion, therefore, that as the work was done without any scheme having been laid before the trustees for their approval the payment asked for cannot be sanctioned, and the appeal must be dismissed.

LINDLEY, L.J.:—

I also abstain from expressing any opinion on the question whether the expenditure can be allowed out of capital money when the land on which the money has been expended has ceased to be in settlement. This case can be decided on the ground that, having regard to sect. 26, the Court has no power to make the order asked for. If we look at that section we find that the groundwork of the whole of it is that a scheme for the execution of the improvement shewing the proposed expenditure is to be laid before the trustees for their approval. It is said that this is a narrow view, and that if the expenditure is beneficial, there is no reason why the Court should not sanction it *ex post facto*. But after the work is done the position of the trustees is entirely different from what it was before. If a scheme is proposed before the work is done, they can consider whether there is not another scheme that will be cheaper and better—after it is done they must either approve or reject, no third course being open to them. The trustees here decline the responsibility of making the payment without the sanction of the Court, and I think we should be straining the Act if we were to give that sanction. Were we to hold that the previous submission of a scheme is not indispensable we should be giving an opportunity for putting unfair pressure on trustees.

LOPES, L.J.:—

The question arising on sect. 26 is very important. I think, when we look at sect. 25, sub-sects. xiii. and xx., it is clear that the work in question comes within that section. But under sect. 26 I think that the Court cannot order the application of capital money in respect of works done by the tenant for life without any previous sanction. The whole idea of sect. 26 is that there should be a scheme submitted and approved before the work is done. What is the use of a scheme if there can be

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an allowance for past expenditure which was incurred without any scheme. The object of requiring a scheme was to give the Court or the trustees, as the case may be, a thorough power of control, and I think that the submission of a scheme and the approval of it before the work is done are conditions precedent. I give no opinion on the other question mentioned by Lord Justice *Cotton*.

Solicitor for all parties: *H. P. Cobb.*

H. C. J.

C. A. 1886 NORTH, J. *Dec.* 13, 14. 1887 *Jan.* 12. C. A. 1887 *Feb.* 25, 26, 28; *March* 1, 12.

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[1886 R. 1764.]

Ecclesiastical Benefice—Resignation—Validity—Acceptance—Condition—Pressure—Pecuniary Consideration—Revocation before Acceptance.

It is not essential to the validity of a deed of resignation of an ecclesiastical benefice that it should be made by the clerk before a notary public; the Bishop can dispense with that formality and accept a resignation made by a deed duly executed, and sent to him by the clerk.

It is not necessary that the Bishop's acceptance of a resignation should be in writing, and no particular form is necessary; and if the resignation is sent in at the Bishop's request no further acceptance is required.

Though the resignation of a benefice must (except in the case of an exchange) be absolute, not conditional, it is perfectly legal for the Bishop to fix a future time at which the resignation, when accepted by him, shall come into actual operation by his declaring the benefice vacant.

The resignation of a benefice is not void because it is made at the request of the Bishop in order to avoid scandal and legal proceedings.

If the Bishop, in accepting the resignation of a benefice, agrees to postpone the declaration of the vacancy in order to enable the clerk to receive the next accruing payment of tithe rent-charge, this does not render the resignation invalid as having been made for a pecuniary consideration.

Per North, J.:—A clerk who has tendered his resignation to the Bishop cannot withdraw it, even before acceptance, if, in consequence of the tender, the position of any party has been altered: *e. g.*, if the Bishop has been thereby induced to abstain from commencing proceedings in the Ecclesiastical Court for the deprivation of the clerk.

THIS action was brought for the purpose of obtaining a declaration that a deed of resignation of his benefice executed by the Plaintiff, a beneficed clergyman, on the 2nd of June, 1886, was

null and void, and that the same was, by deed executed by the Plaintiff on the 10th of June, 1886, revoked and cancelled, before acceptance by the Bishop of the diocese, and an injunction to restrain the Bishop from accepting the resignation, or from in any way treating or acting upon the deed of resignation as valid, or from declaring the benefice vacant, or attempting to institute any other person into it.

The Plaintiff was the vicar of the parish of *Sparsholt-with-Kingston Lisle*, in *Berkshire*. A charge of immorality was publicly made against him in his parish, and in consequence of this the Bishop communicated with him, and required him to take proceedings to clear his character. He then indicted the person who had made the charge for libel, but failed to obtain a conviction.

Upon ascertaining what had occurred at the trial, the Bishop, on the 8th of May, 1886, wrote to the Plaintiff, that he expected to receive from him at once the announcement of what must be the obvious result of the trial, viz., that the Plaintiff was ready to resign his benefice without delay. After some letters between the Plaintiff and his solicitors and the Bishop, a Mr. *Wellings*, acting for the Bishop, and by his authority, wrote to the Plaintiff on the 26th of May the following letter:—"If you will place your formal resignation duly signed in the hands of the Bishop, he will not sign acceptance until a date to be agreed upon, and he will sanction your absence from the parish during the interval. I most strongly advise you to comply at once with this proposition, as being the most lenient course the Bishop could possibly adopt." On the 28th of May the Plaintiff replied thereto as follows: "My dear Lord Bishop,—I desire herewith to place in your hands my resignation of this benefice of *Sparsholt-cum-Kingston Lisle*, conformably with your Lordship's wish, and at the same time I gratefully accept your kind proposal to postpone acceptance of my resignation until a date to be agreed upon, your Lordship meantime permitting me to be absent."

That letter was, with the Bishop's authority, replied to by Mr. *Davenport*, his secretary and the deputy registrar of the diocese, on the 31st of May, as follows: "Sir,—The Bishop of *Oxford* desires me to send to you a deed of resignation, and to

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inform you that his Lordship proposes to date his formal acceptance of it on the 1st of October next, and not to declare your benefice vacant until that date, if the deed is at once executed by you and remitted to me, and if his Lordship also receives in the meantime an assurance of satisfactory arrangements for the care and duties of the parish during your absence. The deed requires to be executed by you before two witnesses, and, if you are unable to obtain the attestation of a notary public in *London*, it may be remitted to me attested by two persons."

The date of the 1st of October was named in that letter in consequence of a communication made to the Bishop in the interval by a friend of the Plaintiff acting on his behalf. And the Bishop stated in his cross-examination, that one of the reasons for that date being agreed to was, that the Plaintiff might thus be enabled to receive the annual tithe rent-charge, or, in other words, that he might not be deprived of the emoluments he had earned by the past discharge of his duties as incumbent.

Mr. *Davenport* also sent to the Plaintiff, with that letter, the ordinary printed form of resignation, with the name and description of the Plaintiff and his parish written into it. It ran thus: "In the name of God, Amen. Before you, a notary public and credible witnesses here present, I, the Rev. *Oswald Joseph Reichel*, vicar of *Sparsholt-with-Kingston Lisle*, in the county of *Berks* and diocese of *Oxford*, for certain just and lawful causes me thereunto especially moving, without compulsion, fraud, or deceit, do purely, simply, and absolutely resign and give up my said vicarage and parish church of *Sparsholt-with-Kingston Lisle*, with all their rights, members, and appurtenances, into the hands of the Right Rev. Father in God *John Fielder*, by Divine permission Lord Bishop of *Oxford*, or of any other whomsoever having or that shall have power to admit this my resignation. And I totally renounce my right, title, and possession of, in, and to the same vicarage and church, with all their rights, members, and appurtenances, heretofore had and hitherto belonging to me, and quit them and expressly recede from them by these presents. And, that this my resignation may have its full effect, I do hereby nominate and appoint *Thomas Marriott Davenport*, of the city of *Oxford*, notary public, my proctor or substitute to exhibit this

my resignation to the said Right Rev. Father, and in my name to pray that his Lordship would graciously vouchsafe to accept thereof, and to pronounce, decree, and declare the vicarage and church of *Sparsholt-with-Kingston Lisle* aforesaid void and to be void of my person to all intents of law that may follow thereupon, and to decree if requisite that intimation of the said avoidance may be issued to the patron thereof."

That instrument was dated the 2nd of June, 1886, and was executed by the Plaintiff, and was, with the attestation thereto of two witnesses (neither of whom was a notary public), forwarded by him to Mr. *Davenport* on the 2nd of June, with the following letter: "Sir,—I have executed the inclosed resignation, on the understanding that the Bishop will postpone acceptance thereof until the 1st of October next. If you cannot dispense with my appearing before a notary public, I will endeavour so to do. Unfortunately both of them in this place happen to be absent at this moment." The Plaintiff was then at *Weymouth*.

On the following day Mr. *Davenport* received that formal resignation, and signed the memorandum of surrender set forth on the second page thereof, after first striking out the words which stated that the Plaintiff had appeared personally before him, and he then sent the document on to the Bishop, with the memorandum of acceptance printed on the third page of the same document, with the blanks filled up in ink, except that the blank for the date was filled up in pencil as the 1st of October, 1886. The Bishop signed the memorandum of acceptance, but he was unable to state the precise date at which he did so. Having signed it, he returned the document to Mr. *Davenport*, who received it shortly before it was stamped. The stamps bore date the 26th of July, 1886.

On the 16th of July the Plaintiff had an interview with Mr. *Davenport*, and gave him two letters, one addressed to him and the other to the Bishop, both dated on that day, and also another document indorsed "withdrawal of resignation." The letter to Mr. *Davenport* was as follows: "Dear Sir,—Be pleased to accept notice from me herewith that I have executed an instrument before two witnesses, and in presence of a notary public, whereby I have cancelled and revoked the deed purporting

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to be a resignation of my benefice of *Sparsholt-cum-Kingston Lisle*, which I was induced to execute under pressure from the Bishop, and which I forwarded to you, on the express condition given to me by you in writing that it should not be presented to the Bishop for his acceptance before the 1st of October next, and that in that instrument, I have also cancelled and revoked the appointment of yourself as my proctor, and withdrawn from you authority to exhibit the same to the Lord Bishop for his acceptance. Be pleased therefore to consider my resignation as withdrawn, unless you hear further from me to the contrary. If you think it necessary to put myself *pro formâ* in order with the Bishop, I inclose a similar notification for him."

In his letter to the Bishop the Plaintiff stated that circumstances had arisen obliging him to reconsider his position since, at the Bishop's request, he was induced to sign a deed of resignation, that he begged respectfully to withdraw such resignation, and he asked the Bishop if he would not be content if he were absent from the benefice for the next five years, giving up all claim to the vicarial tithes and glebe and residence, and undertaking not to return until married.

The document indorsed "withdrawal of resignation" was as follows: "Whereas I, *Oswald Joseph Reichel*, vicar of *Sparsholt-with-Kingston Lisle*, in the county of *Berks* and diocese of *Oxford*, have executed a certain instrument dated the 2nd day of June, 1886, purporting to be a resignation of my said benefice, and therein purporting to appoint *Thomas Marriott Davenport* my proctor, for the purpose of exhibiting the same to the Lord Bishop of *Oxford*: And whereas the said instrument has not been executed by me voluntarily, freely, and unconditionally, but under pressure, and by the request and desire of the said Lord Bishop, and conditional upon its not being accepted before the 1st day of October, 1886, and without legal advice: And whereas I have not appeared personally before a notary public for the purpose of appointing the said *Thomas Marriott Davenport* to act as my proctor in the matter of my said pretended resignation: And whereas I am now advised that the said instrument is null and void and of no force whatever to effect the resignation of my benefice, not having been made freely and voluntarily and

unconditionally, and that the pretended appointment of the said *Thomas Marriott Davenport* is also of no force or validity, not having been made by me personally before a notary public: Now I, the said *Oswald Joseph Reichel*, hereby cancel and revoke the said instrument and pretended resignation of my said benefice of *Sparsholt-with-Kingston Lisle*, declaring it to be my intention not to resign my said benefice, and I also annul and cancel the pretended appointment of the said *Thomas Marriott Davenport* to act as my proctor, hereby withdrawing from him all authority to act as such, and strictly forbidding him from acting as such proctor, and from exhibiting to the said Bishop my said pretended resignation, or otherwise taking action in the matter on my behalf."

This document bore date the 10th of June, 1886, and was witnessed by the same two gentlemen who attested the resignation. After some further correspondence between the Plaintiff and the Bishop, which is specially referred to in the judgment of Mr. Justice *North*, the writ in this action was issued on the 14th of September, 1886.

The Plaintiff applied to Mr. Justice *Grantham*, as Vacation Judge, for an interlocutory injunction, but the application was refused. The Plaintiff appealed, but the Court of Appeal declined to decide any of the points raised upon an interlocutory application, and requested Mr. Justice *North* to advance the trial of the action. The writ was then amended by adding the Provost and Scholars of *Queen's College, Oxford*, who were the patrons of the benefice, as Defendants.

By his statement of claim, the Plaintiff alleged that his resignation of his benefice was void in law, because it was not made by him in person before the Bishop or by instrument before a notary public, and because it was conditional on acceptance being postponed till a future date.

The Plaintiff also said that the instrument of resignation was delivered to the Bishop's secretary as an escrow, not to be presented to the Bishop for signature before the 1st of October, 1886, and that before that date the authority to the Bishop's secretary to present the same had been withdrawn.

The Plaintiff also insisted that the deed of resignation, if

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originally valid, had been revoked by him before acceptance by the Bishop. In addition to the relief claimed by the original writ, the Plaintiff claimed an injunction to restrain the College from presenting any person for institution into the benefice.

The College did not appear at the trial. They had appeared to the writ, but had not delivered any pleading, and they had given notice to the Plaintiff that they should not appear at the trial, but should remain neutral.

The Plaintiff and the Bishop gave evidence at the trial, and other witnesses were examined on behalf of the Bishop.

The action came on for hearing before Mr. Justice *North* on the 13th of December, 1886.

Cozens-Hardy, Q.C., and *A. Young*, for the Plaintiff:—

The deed of resignation executed by the Plaintiff is void on three grounds:—(1.) If originally valid in form, it was withdrawn before acceptance by the Bishop. (2.) It was executed by the Plaintiff subject to a condition, viz., that it should not come into operation until a future date, and under pressure. (3.) The resignation was not made either to the Bishop in person or before a notary public. One of these alternatives is essential by Canon Law to the validity of a resignation of an ecclesiastical benefice.

(1.) A resignation of a benefice is inoperative until it is accepted by the Bishop, and his acceptance is a judicial act and must be evidenced by his signature. It is clear that the Bishop did not accept the Plaintiff's resignation till the 1st of October, that is, not till after the Plaintiff had withdrawn his resignation. A clerk cannot be compelled to resign his benefice, and he cannot resign without the consent of the Bishop; there must, therefore, be a *locus pœnitentiæ* before acceptance by the Bishop. The instrument of resignation was nothing more than an offer by the Plaintiff to resign, and he could withdraw it at any time before it had been accepted. In *Ex parte a Clergyman* (1) a clergyman had executed a deed of resignation of his benefice in the form prescribed by the Act 33 & 34 Vict. c. 91, and had left it for inrolment in Chancery, but he had not taken any of the further

(1) Law Rep. 15 Eq. 154.

steps required by the Act; he afterwards changed his mind, and it was held that he was entitled to have the inrolment vacated.

(2.) The Plaintiff executed the deed of resignation under the pressure of a threat by the Bishop to take proceedings against him in the Ecclesiastical Court, and it was executed conditionally, viz., on a condition that the acceptance of it by the Bishop should be postponed till the 1st of October. There can be no contract between a bishop and a clergyman respecting his resignation. The authorities all shew that the resignation of a benefice is not valid unless it be "*purè, spontè, absolutè, et simpliciter;*" *Phillimore's* Ecclesiastical Law (1); *Fletcher* v. *Lord Sondes* (2). In that case Lord *Eldon* said (3): "If the resignation were conditional, it would cease to be a resignation at all." It was in consequence of the decision in that case that the Act 9 Geo. 4, c. 94, was passed, which authorizes agreements to resign a benefice in favour of one specified person, or one of two specified persons.

(3.) A resignation must be made either personally to the Bishop himself, or before a notary public, *i.e.*, before an officer of the Ecclesiastical Court. A proctor can only be appointed to present to the Bishop a resignation already made: *Gibson's* Codex (4); *Burn's* Ecclesiastical Law (5); *Phillimore's* Ecclesiastical Law (6); *Cripps'* Law of the Church (7); *Hodgson's* Instructions to the Clergy (8); *Bythewood's* Conveyancing by *Jarman* (9). The form of resignation sent by the Bishop's secretary to the Plaintiff was in accordance with the form given by *Jarman*, though the secretary made alterations in it.

The Bishop has no power to waive these formalities; they are as essential as the attestation of a will by two witnesses.

Jelf, Q.C., *Muir Mackenzie*, and *Mackarness*, for the Bishop:—

The Bishop has acted in conformity with what he believed to be his duty to the Church and to the parishioners. The Plaintiff is, no doubt, entitled to rely on the technical objections which

(1) Vol. i. p. 518.
(2) 3 Bing. 501.
(3) Ibid. 598.
(4) Pages 822, 1518, 1519.
(5) 9th Ed. vol. iii. p. 541.
(6) Vol. i. pp. 518, 520.
(7) 6th Ed. pp. 542, 543.
(8) 9th Ed. p. 37.
(9) 2nd Ed. vol. iii. p. 378.

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have been raised on his behalf. But he has come to a Court of Equity claiming equitable relief, and he must shew that he has done equity himself. The Court will not help him to perpetrate a fraud on the Bishop. It is not a mere question of right to property; he has induced the Bishop to alter his position on the faith of his resignation. But for the resignation, the Bishop would have proceeded against the Plaintiff in the Ecclesiastical Court. The authorities which have been cited related to a different state of circumstances—to attempts to resign benefices in pursuance of a corrupt bargain. Therefore great solemnity was attached to the act of resignation. The Bishop has a judicial discretion as to accepting the resignation of a benefice, and he has power to waive the ordinary formalities, and he has done so in the present case. He is the master of the procedure in his own Court.

With regard to the Plaintiff's three points: (1.) Even in the case of ordinary contracts, there are exceptions to the rule that an offer may be withdrawn before acceptance. There is a fallacy arising out of a double meaning of the word "acceptance." There was an acceptance by the Bishop when he received back the document which he had sent to the Plaintiff, but the notification of the vacancy of the living was postponed to the 1st of October, and, till that date, no one else could be put into the living. The instrument of resignation is absolute in form, and if there was any collateral condition it has been fulfilled. It cannot be doubted that the Plaintiff intended to resign when he executed the instrument. The Bishop's acceptance was absolute and complete long before the attempted withdrawal was communicated to him; the acting upon the resignation only was postponed. If the Plaintiff intended from the first to treat the resignation as void after he had received the consideration for it, he was attempting to commit a fraud in which a Court of Equity will not help him. *Ex parte a Clergyman* (1) has no application. The resignation there was under the statute, and some of the necessary steps had not been taken. Here the Plaintiff had in the most solemn way done everything in his power to get rid of his benefice. The object of the formalities required for the resignation of a benefice

(1) Law Rep. 15 Eq. 154.

is to prevent the Bishop and the Church from being prejudiced: *Ayliffe's Parergon* (1).

And, according to Ecclesiastical Law, a resignation once placed in the hands of the Bishop cannot be withdrawn without his consent: *Reformatio Legum Ecclesiasticarum* (*Cardwell's* edition) (2); *Lyndwood's Provinciale* (3); *Ayliffe's Parergon* (4). A resignation may be recalled if it does not come into the hands of the Bishop, or if he does not receive it with the intention of admitting it, but not otherwise, unless with his consent. There is no *locus pœnitentiæ*: *Joannis Devoti Institutiones Canonicæ, De Renuntiatione* (5); *Marchioness of Rockingham* v. *Griffith*, cited in *Burn's* Ecclesiastical Law (6); *Grey* v. *Hesketh* (7). The making of the benefice void is the judicial act of the Bishop; the resignation of the clerk is complete before.

(2.) There was no pressure on the Plaintiff, except that of circumstances which resulted from his own misconduct. In executing the instrument of resignation he was acting voluntarily, believing it to be the best course which he could take in his own interest.

On the face of the instrument it was not made on any condition. The only condition was a collateral one, and that has been fulfilled by the Bishop. Such a collateral condition cannot affect the validity of the deed. A resignation absolute in form is absolute as against the person who makes it: *Rumsey* v. *Nicholl* (8). It is clear from the correspondence that it was intended that the resignation should be absolute, and now the Plaintiff says that it was intended that he should go through a solemn farce. It is clear that the Ecclesiastical Court would have deprived the Plaintiff of his benefice for the offence which he had committed: *Bonwell* v *Bishop of London* (9).

(3.) This objection is at any rate founded on a purely technical blot, and the argument must go to this extent, that, under all circumstances and as between all persons, the absence of those formalities is fatal, just as if they were required by statute.

(1) Pages 467, 468.
(2) Page 71.
(3) Page 107.
(4) Pages 467, 468.
(5) Ed. 1852, vol. i. p. 322, sect. xi.
(6) 9th Ed. vol. iii. p. 543.
(7) Amb. 268.
(8) 2 C. P. D. 294.
(9) 14 Moo. P. C. 395, 416.

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There is no authority for that proposition. There is nothing to shew that such an objection can be raised by the clerk who has resigned. It is a mere matter of procedure which the Bishop can waive. *Heyes* v. *Exeter College, Oxford* (1), shews that a resignation sent to the Bishop by post is valid, if the Bishop accepts it. The ecclesiastical authorities shew that, if a resignation is not made before the ordinary himself, it need not be made before a notary public, provided that it be duly received and accepted by the ordinary. The essential thing is that it should come into his hands and be accepted by him: *Lyndwood's Provinciale* (2); *Ayliffe's Parergon* (3); *Van Espen's Jus Ecclesiasticum Universum* (*De Procuratorio ad resignandum*) (4).

In the *Registrum Brevium* (5) there is a form of appointment of a proctor for the purpose of making a resignation of a benefice. There is no authority for saying that a resignation made to the Bishop by a duly constituted proctor is void because it was not executed before a notary public. The only question is, did the Plaintiff resign his benefice? It is clear that he did resign it absolutely, that the resignation was duly presented by his proctor to the Bishop, and that the Bishop accepted it. This constituted a valid resignation: *Burn's* Ecclesiastical Law (6); *Phillimore's* Ecclesiastical Law (7).

Cozens-Hardy, in reply:—

The doctrine that a Plaintiff who comes to a Court of Equity must come with clean hands applies only when he admits that he has no title at law. Here the Plaintiff says that the deed of resignation is void, and that he is legally entitled to his benefice. And since the *Judicature Act* the Plaintiff can only come to this Court.

The question is not one of procedure only; it is whether the Plaintiff can be deprived of his freehold, which he can part with only by a deed duly executed.

First, as to the withdrawal of the resignation before acceptance by the Bishop, "acceptance" means the declaring the living

(1) 12 Ves. 336.
(2) Page 107.
(3) Page 468.
(4) Vol. i. part ii. sect. iii., tit. x. cap. iii., §§ 1, 2, 3, 4, 5, page 814.
(5) Page 306.
(6) 9th Ed. vol. iii. p. 541.
(7) Vol. i. p. 518.

vacant, not the mental assent of the Bishop to the resignation. There is no evidence that the Bishop signed the form of acceptance before the Plaintiff's withdrawal. If the date of his signature is material, it is for him to prove it. In *Ayliffe's Parergon* (1) the word "admit" is used in the sense of "accept." The words "receive" and "admit" are coupled together, but they refer to distinct acts.

[NORTH, J.:—The expression seems to shew that the receipt of a resignation by alien hands may be a receipt by the Bishop, if he chooses to admit it.]

It does not refer to a mental reception or acceptance by the Bishop. The Bishop is in no way damnified by the withdrawal of the resignation; he has given no consideration for it; he can still take proceedings in the Ecclesiastical Court.

Secondly, it is plain that there was an engagement that, if the Plaintiff would resign, the Bishop would not give his formal acceptance of the resignation until the 1st of October. That was an invalid condition. There is no exception from the rule, except in the case of an exchange of livings, and under the statute 9 Geo. 4, c. 94; *Gibson's* Codex (2). In *Rumsey* v. *Nicholl* (3) the condition was one which might have been lawful, though it was not averred. Leave to amend was offered and was refused. In the present case the condition was not a lawful one. The resignation was also corrupt under 31 Eliz. c. 6, s. 7, and, therefore, bad in law, because it was made for a pecuniary consideration, inasmuch as the declaration of the vacancy was postponed to enable the Plaintiff to receive the tithe rent-charge next accruing due.

Thirdly. The old rule that a resignation might be made through a proctor is no longer law: *Reformatio Legum Ecclesiasticarum* (*Cardwell's* edition) (4); *Gibson's* Codex (5). The document is not only to be attested by a notary public, but it is addressed to him. In *Heyes* v. *Exeter College, Oxford* (6), the resignation was made before a notary public; the only question was whether it had reached the Bishop properly. Lord *Erskine*

(1) Page 468.
(2) Page 821, sect. 8.
(3) 2 C. P. D. 294.
(4) Page 71.
(5) Page 822.
(6) 12 Ves. 336.

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held that the appointment of a notary as proctor to present the resignation to the Bishop might be revoked by the clerk, and that he could lawfully send the instrument of resignation to the Bishop by post.

1887. Jan. 12. NORTH, J.:—

This action is brought for the purpose of obtaining a declaration that the Plaintiff is still vicar of *Sparsholt-with-Kingston Lisle*, in the county of *Berks*, and that a certain instrument of resignation executed by him, and bearing date the 2nd of June, 1886, is void and of no effect, with consequential relief. The Defendants are the Lord Bishop of *Oxford*, within whose diocese *Sparsholt* is situate, and the Provost and Scholars of *Queen's College, Oxford*, the patrons of the living.

The Plaintiff's case was rested by his counsel principally upon three propositions of law, and I was told that they were no doubt legal technicalities, but that the Plaintiff was entitled to insist upon them to avoid being deprived of his incumbency. The Plaintiff's counsel did not call any witnesses, and they only put the Plaintiff himself in the box as a formal witness for cross-examination, upon the Defendant's counsel refusing, unless that was done, to admit or produce certain essential documents with respect to the contents of which the Plaintiff apparently was not in a position to give secondary evidence. An undertaking to produce the Plaintiff for cross-examination having been given, all difficulty about those documents ceased.

In order to deal properly with the points raised it is necessary for me to mention shortly the position in which the parties stood. [His Lordship then stated the facts of the case as set forth above, and continued:—] When and under what circumstances the document called the "withdrawal of resignation" was executed I do not know; the Plaintiff's evidence upon the subject was most unsatisfactory, and I do not feel able to rely upon it. The witnesses who could have confirmed him were not called, although one of them was present in Court, and the Plaintiff's counsel asked for a night to consider whether they should call him or not; and at an interview which took place between the Bishop and the Plaintiff on the 12th of July it is admitted by the Plaintiff

that, though his leaving his benefice on the 1st of October was the subject of conversation between them, the withdrawal of his resignation was never alluded to. That withdrawal was only stamped subsequently to that conversation, viz., on the 14th of July. However this may be, it is clear that the withdrawal was never communicated to the Bishop or Mr. *Davenport* before the 16th of July.

I do not think it is necessary to review the subsequent correspondence in detail, but one letter from the Plaintiff to the Bishop, dated the 12th of August, 1886, I cannot pass over. That letter contains this passage: "It becomes then unnecessary to consider whether it was ever valid, not having been made freely and voluntarily, or because no proctor was therein appointed before a notary public to present it for your acceptance, nor need I further point out that it was never executed by me *animo resignandi*, or believed to be intended to take effect, but was signed without legal advice (as tendered by your secretary), as a temporary measure to afford me time to look round and review the situation, and as such 'I gratefully accepted it,' as from a friend, under the belief that a resignation may be withdrawn at any time until it is accepted. There has been no bad faith on my part. It has, however, been formally withdrawn, and the withdrawal brought to your Lordship's and your secretary's notice, and the latter assured me on the 16th of July that, having withdrawn it, I now stood in the same position as I did after the trial."

Mr. *Davenport* states positively (and I believe him) that he never did give any such assurance. This statement, to the effect that the resignation was never intended to be a real one, was again put forward by the Plaintiff in his affidavit on the interlocutory motion in this action, and in his cross-examination before me the Plaintiff went still further. He said then, "I understood the Bishop's request to me to send in my resignation was a request to go through a formality only. My idea from the first was that the Bishop never intended that the resignation should take effect. I knew the Bishop might take proceedings in the Ecclesiastical Court, unless I resigned. The whole idea of resignation came from the Bishop. He and I both

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looked on it as a formality not to take effect. I did not think he would declare the vacancy on the 1st of October. From the Bishop dispensing with my going before a notary public, I understood him to intend that the instrument was not to take effect. When I said in my affidavit that I had previously absolutely refused to resign, I meant that I had refused to resign absolutely. I thought that the Bishop did not intend to accept my resignation, unless I exchanged. Nothing had passed between me and the Bishop, or Mr. *Davenport*, or Mr. *Wellings*, about any exchange. I mean to say that the intention was, that the Bishop should be in a position to represent that he had my resignation in his hands, although it was not a real resignation. I never delivered the resignation as my act and deed, and did not mean the Bishop to think so. I knew that the deed bound me to nothing, and that I could withdraw it. I knew that time would be running against the Bishop under the *Clergy Discipline Act*. There was no reason why I should resign my living from scandal to the parish or otherwise." These statements by the Plaintiff, as well as others in his cross-examination, render it, I am sorry to say, impossible to give any weight to his evidence. That there was any such collusive sham arranged between the Bishop and the Plaintiff, as the latter suggests, I do not believe for a moment; not only is it positively denied by the Bishop, but it is entirely inconsistent with all the letters and acts of both parties throughout May, June, and July. The Bishop all along made it a *sine quâ non*, that the parish should be purged of the presence of the Plaintiff; he gave the Plaintiff the choice of voluntary resignation or hostile proceedings in the Ecclesiastical Court, and he only abstained from commencing such proceedings, because the Plaintiff sent in his formal resignation, which the Rural Dean, at the Bishop's request, at once made known to the parishioners. Whether the Plaintiff did or did not from the first contemplate in his own mind some such trick as he afterwards attempted, I do not know. But I am quite satisfied that the Bishop from the first had a real resignation, and nothing else, in view, and that the Plaintiff thoroughly well knew that this was the Bishop's meaning.

On the 14th of September the Plaintiff issued the writ in this

action against the Bishop, and on the 22nd of that month applied for an interlocutory injunction to restrain the Bishop from accepting the Plaintiff's resignation, or treating it as valid, or declaring the benefice vacant, or instituting any other person thereto. The motion was dismissed by Mr. Justice *Grantham*, as Vacation Judge, with costs. And on the 1st of October an inhibition under the hand and seal of the Bishop was issued, which recited that the Bishop had that day declared the benefice void, on the Plaintiff's resignation thereof as incumbent, and forbade him officiating therein.

There was an appeal from the order dismissing the Plaintiff's motion, but the Court of Appeal, instead of disposing of it, requested me to advance the trial, which I have accordingly done.

The Plaintiff's counsel raised and argued three points of law, the first of which in logical order (though not the first argued) is, that the instrument of resignation itself was invalid, inasmuch as it was not made before the Bishop personally, nor before a notary public, one or other of which formalities is said to be essential by canon law. I have carefully considered the authorities on these points cited to me, and I do not find that they bear out this proposition. Resignation may be to the Bishop in person, and, that, if he accepts it, is complete and final. But it is not suggested that this is the only mode by which resignation may be effected. *Ayliffe's Parergon* (1) shews that a resignation to a wrong person is binding upon the person making it, if the ordinary will ratify and confirm it. Again, it is stated in *Lyndwood's Provinciale* (2), that a resignation to the proper superior may be made otherwise than by personal appearance before him, for instance, by proctor or by letter. Neither of these authorities refers to any resignation before, or any employment of, a notary. The *Registrum Brevium* gives a form for the appointment of a proctor to effect resignation, but makes no mention of a notary. At pp. 822, 823, of *Gibson's* Codex there is a statement of the rules of canon and common law concerning resignation. The first and second points are, that it must be made to the person who hath power to admit, and who must be a superior. (In the present case it is the Bishop.) The third point is, "Resignation

(1) Page 468. (2) Page 107.

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must be made in person, and not by proxy. There is in the register of writs, one entitled, *Litera Procuratoria ad resignandum*, by which the person constituted proctor was enabled to do all things necessary to be done, in order to an exchange (and of these things, resignation was one); and *Lyndwood* supposes that any resignation may be made *per procuratorem;* but the doctrine of the *Reformatio Legum* is, *Ut omnia prorsùs in hoc negotio sincera sint, procuratores excludimus, nec eos ullo modo patimur ad sacerdotium dimissionem admitti.* And, I take it (in practice) there is no way of resigning, but either to do it by personal appearance before the ordinary, or, at least, to do it elsewhere before a public notary, by an instrument directed immediately to the ordinary, and attested by the said notary; in order to be presented to the ordinary, by such proper hand as may pray his acceptance. In which case, the person presenting doth not resign, *nomine procuratorio*, as proctors do, but only presents the resignation of the person, already made." This passage clearly shews that the "*resignatio per procuratorem*" there forbidden was a resignation by "power of attorney," as distinguished from a resignation made by the clerk himself. There are obvious reasons why the ceasing to hold a cure of souls should be a personal act, and not one done by an agent under a general power. The very next paragraph points out that no such person can discharge himself of his cure, but upon good motives to be approved by his superior. And the passage quoted from the *Reformatio Legum Ecclesiasticarum* does not in any way prevent a proctor duly authorized so to do from presenting a resignation already made, as *Gibson* points out clearly.

As I understand the passage from the Codex, which I have read in full, *Gibson* is pointing out the ways in which in practice (to use his own phrase) a resignation is effected, and it shews that a personal appearance before the ordinary is not necessary, and that another practical way is to do it before a notary; but he does not say how this had become legal, nor that it was in fact the only legal alternative. In fact the introduction of the words "in practice" implies that there were other modes which were not practised. In *Burn's* Ecclesiastical Law (1) the passage from

(1) 9th Ed. vol. iii. p. 541.

Gibson which I have read is copied verbatim, except that it runs, "but in practice there is no way (as it seemeth) of resigning but"—and so on; and in *Phillimore's* Ecclesiastical Law, and in *Cripps'* Law relating to the Church and Clergy the same words are used, without addition thereto or diminution therefrom. Under these circumstances I do not find anything in canon, statute, or common law making it essential that a resignation, to be valid, should be either personal, or before a notary by an instrument attested by him and directed to the ordinary. I do not see why it would not be legal if done by letter, as *Lyndwood* puts it, or by the ratification by the ordinary of a resignation made to a wrong person, as expressed in the *Parergon*. The Bishop is entitled to prescribe what formalities he may require, for the purpose of preventing any dispute at a future time, as to whether an incumbent has actually resigned or not, and I am not aware of any law which imposes any obligation upon him as to the procedure he should insist upon in such cases, or which prevents him from dispensing in any particular instance with the formalities ordinarily required in practice for his protection. The Bishop stated in his evidence that, in exceptional cases, he does in practice dispense with attendance before a notary; that he has done so five or six times in the last few years; and that it would be very inconvenient if he could not. And, though the Bishop could not make a practice for himself contrary to law, I find nothing to shew that his practice is of that character. Indeed, in *Heyes* v. *Exeter College, Oxford* (1), the validity of an instrument of resignation came in question. The incumbent executed it before a notary, and appointed two other persons to present it to the ordinary. It was not presented by them, nor did the incumbent attend in person before the Bishop, so that neither of the two courses which alone are said to be legal was adopted. In fact the incumbent himself sent it by post to the Bishop, and, the Bishop being content to accept it, that was held to be a valid resignation.

In the present case a resignation in proper form was sent by the Plaintiff to Mr. *Davenport*, in order that he might hand it to the Bishop, and he did so hand it at once. It was stated at its head that it was made before a notary public, but this

(1) 12 Ves. 336.

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formality, which might have been insisted on, was expressly waived. The Bishop accepted it, and, unless the Plaintiff is right as to his other points or one of them, the resignation was, in my opinion, valid and effectual.

I do not forget that the Plaintiff by his pleadings, affidavit, and evidence alleges that Mr. *Davenport* was to retain the instrument as an escrow, and not present it to the Bishop until the 1st of October. But in my opinion this allegation is unfounded and untrue. It is quite inconsistent with the letters written at the time, especially the Plaintiff's own letter of the 28th of May.

The second point made on behalf of the Plaintiff is, that the instrument of resignation is void, because it was made under pressure and on condition, and in reply a third objection (which was not pleaded) was raised, viz., that it was made for a pecuniary consideration.

It is clear that a resignation must be unconditional, except in the case of an exchange, to which, however, I need not further refer. To use the language of the old writers, it must be made *purè, spontè, absolutè, et simpliciter.*

First, as to pressure. The Plaintiff was, no doubt, in a difficult position, arising from the situation in which he found himself by his own misconduct. But there is no evidence of any pressure being applied to induce him to resign. The alternatives between which he had free choice were, resignation by his own act, or deprivation by hostile proceedings in the Ecclesiastical Court. He deliberately, after full consideration, elected to resign of his own accord, with all the consequences before him, rather than have such proceedings instituted. In his letter of the 21st of May he stated that he felt deeply how much he had offended, and that he would do anything in his power to prevent further scandal. The Bishop, no doubt, felt strongly, and stated plainly, how impossible it was that the care of the parish should be left in the Plaintiff's hands. But I do not find that he used any pressure on the Plaintiff, much less any such pressure as could render the Plaintiff's resignation corrupt or illegal.

Next, as to the resignation being under condition and for a pecuniary consideration. This argument is based upon the fact,

that the date of the formal acceptance of the resignation was postponed until the 1st of October, one of the reasons being, that the Plaintiff might receive the tithes to the end of the current year. But this was not, in my opinion, any consideration for the resignation. It merely left the Plaintiff in receipt of the legal emoluments of his office during the time he filled it, and those emoluments he was to receive, not by virtue of any bargain that he should receive them arising out of his resignation, but because they had become his by his institution to the living, and continued his until he ceased to be vicar. It was necessary to fix some time from which the actual resignation should operate. If proceedings in the Ecclesiastical Court had become unavoidable, some time must necessarily have elapsed before any sentence of deprivation could have been passed, and, in my opinion, the Bishop acted wisely and within his powers in fixing a time at which the formal acceptance should be dated and declared. The contention of the Plaintiff involves the proposition, that any resignation which was not to come into full operation at the very moment at which it was sent in and accepted, but only at a future time agreed on, would be invalid, and I do not assent to this proposition. It seems to me a confusion of language to call the fixing the date from which the resignation was to operate the insertion of a condition. The forms given by the *Incumbents Resignation Act*, 1871, provide for a benefice being declared void, and a pension made to commence, as from a future date, and I am not aware of anything to render an honest arrangement, that a resignation shall take effect from a named future day, in anywise illegal. It is clear that it cannot prejudice the patron of the living, for all the authorities agree, that the time for lapse runs only from the time when the patron has notice of the actual avoidance.

I come to the conclusion, therefore, that the resignation was not invalid on any of these grounds.

The third point made by the Plaintiff's counsel was, that, assuming the resignation to be good in form and in substance, still no resignation is binding or of any effect until it has been accepted by the ordinary, and that, until such acceptance, it may be withdrawn by the person who has executed it; and that

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it was so withdrawn in the present case. It was likened to an offer by *A.* to sell to *B.*, upon certain specified terms. If *B.* accepts the offer so made, both parties are bound. But, before *B.* has notified to *A.* his acceptance of such offer, *A.* may withdraw his offer, even though he has given *B.* a definite time within which to accept it, and that time has not expired: see *Routledge* v. *Grant* (1). This rests upon the clear settled law, that an offer while unaccepted, being given without consideration, is a mere *nudum pactum*, and does not bind the person making the offer. See *per* Lord Justice *James* in *Dickinson* v. *Dodds* (2). But the case is quite different if there be a consideration. If, for instance, *A.* makes such an offer to *B.*, and, in consideration of £10 paid by *B.* to *A.*, agrees that the offer shall be open for a week, it would not be competent to *A.* to withdraw the offer before the week had expired.

In the present case it is essential to consider what the so-called proposal and acceptance were. The argument of the Plaintiff's counsel is, that the act of the Plaintiff in sending in the resignation on the 2nd of June was an offer which required some acceptance by the Bishop, and was revocable until such acceptance. That does not appear to me to be a true view of the case. In my opinion the offer was by the Bishop, and was to the effect, that, if the Plaintiff would place in the hands of the Bishop his formal resignation duly signed (the formal acceptance of which resignation declaring the benefice vacant the Bishop would date on the 1st of October), the Bishop would on his part abstain from taking against the Plaintiff the threatened proceedings in the Ecclesiastical Court, and that this offer was accepted by the Plaintiff, by sending his resignation with his letter of the 2nd of June, and was acted upon by the Bishop in abstaining accordingly from instituting such proceedings. And it seems to me impossible for the Plaintiff to contend, that, having thus escaped such proceedings, at any rate for the time, it was open for him to withdraw the formal resignation, the giving of which was the price he paid for the time so given. If any authority were required to shew that the giving of time is a valuable consideration, the

(1) 4 Bing. 653. (2) 2 Ch. D. 463, 473.

cases of *Oldershaw* v. *King* (1) and *Alliance Bank* v. *Broom* (2) supply such authority.

But this does not exhaust this part of the case. Assuming that it were open to the Plaintiff to withdraw his resignation before acceptance, the next question is, whether he did so withdraw it. It was not suggested that the withdrawal could operate before the date at which it was communicated to the Bishop, which was the 16th or 17th of July. It is not necessary to consider, therefore, when the withdrawal was actually executed. When, then, did the Bishop accept the resignation? In my opinion he accepted it when he received back the deed of resignation executed by the Plaintiff, which was on the 3rd or 4th of June. Looking at all the circumstances of the case, I think that the receiving it back without objection, and abstaining from further action, was an acceptance, and that it was not necessary that the acceptance should be in writing. But, if that was not an acceptance, I am of opinion that the Bishop accepted it when he signed the memorandum of acceptance on the third page of the sheet on which the deed of resignation is printed. The exact date of that signature is not proved, further than by shewing that it was some days before the 26th of July. The Bishop was unable to state the precise date. But, in my opinion, the burthen of proving that the resignation was withdrawn before acceptance rests upon the Plaintiff, and he has wholly failed to prove this. Indeed, my own conclusion from what is proved is, that the Bishop signed the acceptance before he had notice of withdrawal, for I am satisfied that, if the Bishop had only signed it after that notice, he would not have forgotten this circumstance, although the exact date of the execution had passed out of his mind; and would have so stated.

I have not forgotten the statement in the inhibition, that the Bishop "has this day declared" the benefice void, but that, in my opinion, merely refers to the formal declaration to settle the date of the actual avoidance of the living. It is said that this is using the word "acceptance" in two senses, but that is a mere verbal criticism, without substance. I see no difficulty in holding

(1) 2 H. & N. 517.
(2) 2 Dr. & Sm. 289; more fully reported in 34 L. J. (Ch.) 256.

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that there may be an acceptance which would prevent the withdrawal of a resignation, consistently with a further formal acceptance fixing the date of avoidance of the living, just as I consider the first paragraph of the Plaintiff's claim, asking that it may be declared that the resignation was cancelled before acceptance, quite consistent with the second paragraph, which asks that such resignation may be given up for the purpose of being cancelled, *i.e.*, for formal cancellation.

There is yet another difficulty in the Plaintiff's way, arising out of the ecclesiastical law upon this subject. In the *Reformatio Legum Ecclesiasticarum, Cardwell's* edition (1), it is laid down that, if a man has once given up a benefice, and, afterwards changing his mind, wishes to return to it again, this second and later wish will be in vain, unless, peradventure, some cause exist which makes the ordinary think that the former cession should be undone and treated as nothing. It is not stated in terms that this applies to a case in which the resignation has not been accepted, but I think that it does, because, if the avoidance had been completed by acceptance, a new presentation, institution, and induction would be necessary; "*Factâ et probatâ renuntiatione, frustrà renuntiantem pœnitet eorum quæ gessit, cum omne amiserit jus in beneficio, quo se abdicavit, et quod non nisi novâ electione et collatione recuperare potest:*" Canonical Institutes of John the Devout (2). And such ceremonies could not be dispensed with by a mere change of mind on the part of the Bishop and the priest.

Again, at p. 468 of *Ayliffe's Parergon*, I find the following passage: "And hence it is, if such a resignation be made into the hands of a layman, though it be made *spontè et purè*, yet it is not binding in prejudice of the Church or of him, to whom the admission of such resignation belongs, in such a manner, but that the Church or superiour may reclaim the person thus resigning: but yet 'tis valid in prejudice to the person making such resignation, if the ordinary will ratify and confirm the same; so that he cannot recover his benefice again (especially) if the ordinary admits of such resignation. For by such a resignation the possession of the benefice is lost, though not the property thereof; because possession is lost by intention alone, but property is not

(1) Page 71. (2) Ed. 1852, p. 322.

so departed from: and, again, because a resignation is not binding without the Bishop's consent. But note, where the ordinary does not receive and admit a resignation made in respect of some benefice, it being made into some other hands than his who ought to receive it; and is in debate with himself whether he shall admit it or not; and if the person tendering the same shall in the meanwhile repent thereof (*the matter remaining entire*) he may without any new institution occupy and repossess himself of such benefice, in the same manner as he enjoyed it before."

The statement in *Lyndwood's Provinciale* (1) is to the same effect though in different terms. From these passages it appears that, in some cases, a resignation of a living, once made, cannot be revoked or recalled, even though the ordinary has not accepted it; and though there is one case in which the person resigning has a *locus pœnitentiæ*, while the Bishop is in debate whether he shall accept or not, it can, even then, only be done "if the matter remains entire," as *Ayliffe* puts it, or "*re integrâ*," according to *Lyndwood*. By that I understand that, according to ecclesiastical law, a person who has tendered a resignation, which has not been accepted, and who might withdraw it, if matters remained as they were, is prevented from withdrawing it, even before acceptance, if, in consequence of the tender, any party is in a different position from that in which he would have been if no tender had been made. Applying that to the present case, the Plaintiff, by sending in his resignation, procured a postponement of legal proceedings against himself, and thereby, according to ecclesiastical law, incapacitated himself from withdrawing it during the interval before the 1st of October; and this result would follow, even if the true view of the facts be, that the Bishop did not accept the resignation until that date.

Under these circumstances, it appears to me that the Plaintiff's attempt to withdraw his resignation fails entirely, and that, having failed on all points, the action must be dismissed with costs.

W. L. C.

From this judgment the Plaintiff appealed. The appeal came on for hearing on the 25th of February, 1887.

(1) Page 107.

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Jeune, and *A. Young*, for the Appellant, followed the same line of argument as in the Court below. They cited the following authorities: *Gibson's* Codex (1); *Burn's* Ecclesiastical Law (2); *Ayliffe's Parergon* (3); *Watson's* Clergyman's Law (4); *Reiffenstuel's Jus Canonicum* (5); *Reformatio Legum Ecclesiasticarum* (6); *Johnson's* English Canons (7); *Registrum Brevium Originalium* (8); *Corpus Juris Canonici* (9); *Oughton's Ordo Judiciorum* (10); *Constitutions of Othobon* (11); *Kemp* v. *Wickes* (12); *Ffytche's Case* (13); *Martin* v. *Mackonochie* (14); 26 Hen. 8, c. 3, ss. 21, 22; 31 Eliz. c. 6; 34 & 35 Vict. c. 44, s. 9, Sched. B.

Charles, Q.C., and *Mackarness*, for the Bishop of *Oxford*, referred to *Lyndwood's Provinciale* (15); *Van Espen's Jus Ecclesiasticum Universum* (16); *Joannis Devoti Institutiones Canonicæ* (17); *Stellingfleet's* Ecclesiastical Cases (18); *Rumsey* v. *Nicholl* (19); *Heyes* v. *Exeter College, Oxford* (20); *Bonwell* v. *Bishop of London* (21); *Grey* v. *Hesketh* (22); *Godolphin's Repertorium Canonicum* (23).

1887. March 12. COTTON, L.J.:—

This was an action instituted for the purpose of having it declared that the Plaintiff is still vicar of *Sparsholt*, and to have an instrument of resignation which he had executed, dated the 2nd of June, 1886, declared null and void, and that it should be cancelled, and also for an injunction to restrain the Defendant, the Bishop, from in any way acting upon or treating the resignation as valid, and from declaring the benefice vacant, and from instituting another person. The circumstances of the case may

(1) Ed. 1761, p. 821.
(2) 9th Ed. vol. iii. pp. 541, 542.
(3) Pages 467, 468.
(4) Page 28.
(5) Lib. i. tit. ix. pp. 268, 281, 282.
(6) Cardwell's Ed. p. 71.
(7) Ed. 1720, Constitutions of Otto, A.D. 1237.
(8) Page 306.
(9) Ed. Leipsic, 1839; Decretales, bk. ii. tit. 19, ch. 11.
(10) Vol. ii. p. 221.
(11) 1 Phill. Eccl. Law, p. 510.
(12) 3 Phillim. 264.
(13) 2 Phill. Eccl. Law, p. 1121.
(14) Law Rep. 2 A. & E. 116, 153.
(15) Page 107.
(16) Vol. i. pt. ii. sect. iii. tit. x. cap. iii. p. 814.
(17) Ed. 1852, vol. i. p. 322, sect. xi.
(18) Vol. i. p. 60.
(19) 2 C. P. D. 179, 294.
(20) 12 Ves. 336.
(21) 14 Moo. P. C. 395.
(22) Amb. 268.
(23) 3rd Ed. p. 282.

be stated very shortly. [His Lordship then shortly stated the circumstances which led to the writing of the letters of the 26th of May and the 28th of May, 1886, which he read, and continued :—] Stopping there, I do not consider that there was any contract or bargain between the Bishop and the Plaintiff; but I do understand from those letters which I have read and from the previous letters, that there was a sort of intimation by the Bishop that it would be necessary for him to take proceedings in the Ecclesiastical Court in consequence of the charge which had been brought against the Plaintiff, unless he prevented any further scandal in the parish by resigning; and then, as I understand, there was an intimation by the Bishop, at the instance of the Plaintiff, that he would not act on the resignation if put into his hands by immediately declaring that the benefice was void, but he would allow the Plaintiff still to continue in his position of vicar of *Sparsholt* till the 1st of October, but that as from that time he would act on the resignation by declaring the benefice void. Mr. *Davenport* then sent the Defendant a deed of resignation, which was to a great extent in the ordinary form : it was a printed form, slightly varied. It was signed, sealed, and delivered by the Plaintiff on the 2nd of June, and was sent by him to Mr. *Davenport*; and he immediately sent it on to the Bishop, who received it on the 3rd of June.

What I shall first consider is this—Was there, as regards the act to be done by the Plaintiff, an effectual resignation of this benefice? There was the deed signed by him, but he says in his evidence, that neither by him nor by the Bishop was it ever intended that that deed should be effectual for the resignation of the benefice, but that it should be put into the Bishop's hands as something which he might shew, but not really to be acted on by him. That is entirely contrary to all the correspondence which took place as between the Plaintiff and the Bishop, or those who were acting for the Bishop, before that deed was executed. It is obvious that the Bishop, in declining to grant an interview to the Plaintiff, and saying that it was necessary that he should resign, intended that he should have an actual resignation of the benefice from the Plaintiff, and, although the Plaintiff does, and I regret it, swear that it was never intended by him or by the

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Bishop that it should be anything but form, the Bishop states that that was not his intention, but that he always intended that it should be an actual resignation. With those remarks I leave that point.

But was the deed itself a good deed, such as would be effectual as a resignation on the part of the Plaintiff? The great objection urged to this deed, as regards the mere deed, was that it had not been executed before a notary public. But how was it that it was not so executed? It was, as originally framed, intended undoubtedly to be executed before a notary public; but Mr. *Davenport* thinking that it might be difficult for the Plaintiff to execute the deed before a notary public, told him that if he had such a difficulty, it might be attested by two ordinary persons. It was, therefore, for the convenience of the Plaintiff that the officer of the Bishop intimated to him that the formality of executing this before a notary public would not be insisted on by the Bishop; and, if we were to hold this objection good, it would come to this—that where, for the convenience of the Plaintiff, and with the assent of the Bishop, the ordinary formality was not complied with, the Plaintiff could afterwards take advantage of that concession made to him by the Bishop and his advisers, and say that the deed, signed as his solemn deed of resignation, was to be considered as null and void. Unless there is some positive law, some statute, or something equivalent to it, which would require us to come to that conclusion, I should be unable to do so. Does the Canon Law require that that should be so? In my opinion there have been no authorities referred to (and every possible authority was quoted to us on behalf of the Appellant) that force us to come to that conclusion. The passage most relied on, and which seemed most like an authority, that the resignation to be effectual must be by a deed executed before a notary public, was a passage from *Gibson's* Codex (1) about resignation. But what is he there considering? He is considering the question whether, as some supposed, there could be a resignation by an attorney or proxy; and dealing with that, he says: "I take it (in practice) there is no way of resigning, but either to do it by personal appearance before the ordinary, or, at

(1) Ed. 1761, p. 822.

least, to do it elsewhere before a notary public, by an instrument directed immediately to the ordinary, and attested by the said notary, in order to be presented to the ordinary, by such proper hand as may pray his acceptance." It is not said there that a deed really executed by the clerk desiring to resign, if not executed before a notary public, where there is no question at all as to whether in fact he did execute it, was one which was to be disregarded as null and void; and, in my opinion, this formality of execution before a notary public is a formality to protect the Bishop, to prevent him from accepting as a deed of resignation that which was in fact never executed by the clerk who was supposed to be desirous of resigning his benefice. And if the Bishop is satisfied *aliunde* that the instrument is that of the clerk, and is willing to waive that formality, in my opinion no objection can be taken to the effect or validity of the deed on the ground that a formality intended for the protection of the Bishop was not adopted, there being, in fact, no question that he really executed the deed. In my opinion that objection entirely fails.

Then the next objection was this. Was this deed of resignation effectually revoked or recalled by the Plaintiff? It appears that on the 10th of June the Plaintiff executed a deed revoking the prior deed of resignation which he had executed, but he did not notify that to the Bishop or Mr. *Davenport*, the secretary of the Bishop, till the 16th of July. The deed of resignation had given a mandate to Mr. *Davenport* to present this deed to the Bishop, and it was contended that Mr. *Davenport* was not authorized to present the deed to the Bishop till the 1st of October, and that, therefore, this deed of revocation was made before the mandate or authority given to Mr. *Davenport* authorized him to deal with the deed of resignation. In fact, as I have already stated, Mr. *Davenport* had acted on the authority given him in absolute terms by the deed of resignation, without any restriction of time, by sending the deed to the Bishop, so that the Bishop received it on the 3rd of June, and, in my opinion, Mr. *Davenport* was fully justified in so doing. All that the Bishop promised was this, that he would not sign the formal acceptance of the resignation till the 1st of October; but, on the

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evidence, there is no restriction on the authority given to Mr. *Davenport* so as to make it wrong for him at once, when he received the deed, to send it on to the Bishop, whatever the consequence might be.

Then it was said, and this was the principal argument of the Appellant, that a deed of resignation by a clerk of his benefice may be revoked at any time till acceptance. Before I consider the actual terms in which that objection was taken, I would deal with the question, which really is one of substance, as regards the act of the clerk and the act of the Bishop as regards resignation. Undoubtedly no resignation is effectual until it has been assented to or approved by the Bishop. And why is this? The clerk has received the benefice from the Bishop: the Bishop has entrusted him with the cure of the souls of the parish, and it would be wrong and contrary to principle to allow a clerk who has received that charge from the Bishop to give up his charge without the sanction of the Bishop to his so doing. It is a subordinate discharging himself, without the assent of his superior from duties which the superior has committed to him; and till the Bishop or the ordinary, whichever he may be, has assented, and in that sense accepted the resignation, the resignation may be a nullity; and till it is assented to by the Bishop it is not effectual. That is really what is meant. We see the distinction clearly in a passage in *Lyndwood*, quoted by *Gibson*, in the chapter I have already referred to, where *Lyndwood* lays down this—that, although, where there is a cure of souls, the resignation cannot be effectual without the assent of the ordinary, yet where the resignation is of a sinecure, the deed of resignation will itself avoid the sinecure, because there is nobody prejudiced except the person who resigns, and who can if he pleases, of himself, where there is no cure of souls attached, give up and resign that which he has. But, he says, and I shall have to refer to the words on another part of the case, where there is the cure of souls there is necessity then for the *admissio episcopi*, that is, the assent of the Bishop. That is the obvious substance of the matter, that where that which is resigned involves a cure of souls committed to the clerk by the Bishop, the clerk cannot give up that cure without the assent of the Bishop.

But then the argument proceeded in these terms: "Yes, but there was a revocation before there was any acceptance; for in this case the Bishop had said, I will not sign the formal acceptance till the 1st of October, that is the acceptance, and the revocation was long before that time;" and there were a great many passages from canonical authors referred to for the purpose of enforcing this argument, and in particular a passage from *Gibson's* Codex, in which are the words "until the acceptance of the Bishop." Let us look and see what really is meant by the authorities which were referred to. I will take one authority which was quoted, *John the Devout, Institutiones Canonicæ* (1), because there it is stated in these words that there is *pœnitentia* up to a certain point, but that when "*facta et probata resignatio*" there is no place for *pœnitentia*. "*Facta*" means where the clerk has executed the deed of resignation; "*probata*" where the Bishop has done what? Approved of it. So up to the time when the clerk has executed the instrument of resignation, or come in person to express his intention to resign, there was still ground for revocation, but when the Bishop has approved, *probata*, there is no place for the resignation. Then, in another passage, there was the expression "*admissio*" of the Bishop, and it was said that means acceptance. But *admissio* is not acceptance in the sense of signing the formal instrument which was signed by the Bishop. I looked at one of the best lexicons and I found that *admissio* had the meaning of grant or permission, and I found in the same lexicon the sense of approval. So that, in my opinion, all that was meant by this was that there is no room for revocation when the Bishop has either approved or admitted in the sense of *admissio*. The statement that there can be *admissio* means simply this, that as long as the resignation has not become binding by the assent of the Bishop or Ordinary, so long can there be a revocation of the incomplete act; but as soon as the resignation is complete by the assent of the Bishop, then there is no *locus pœnitentiæ*, there is no power to recall. In my opinion there was no power on the 16th of July for the Plaintiff to recall his resignation, if, previously to that time, there had been an assent or approval of his resignation by the Bishop.

(1) Ed. 1852, vol. i. p. 322, sect. xi.

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Now one must consider here, and that question was very much argued, whether there is any form of assent on the part of the Bishop necessary. I use the word "assent," not acceptance, because that is a word the doubtful meaning of which has given rise to great difficulty. I cannot find that there is any form required. It could not be intended that any form is required when a clerk comes in person to the Bishop and says, "I wish to resign." The Bishop says, "I assent to that," and that would be all. But it is said that when the resignation is by deed and not by a clerk in person, then signature at least is necessary; and reliance was placed on the decree of the 4th Lateran Council, which gave certain directions as to the judicial act of the Bishop being reduced into writing. As regards the judicial act, I doubt very much whether the acceptance by a Bishop of a resignation of a clerk can be properly called a judicial act. In one sense, no doubt, it is a judicial act; because when the Bishop has the resignation presented to him he must consider not arbitrarily, but reasonably, whether the resignation is for good ground, whether he ought to receive it. There may be some reason why it is not proper for him to accept the resignation. It may be done for simoniacal or other reasons, and then it would be his duty, if he knows that, to refuse to accept it. In that way it is a judicial act. It is an act in respect of which he is to exercise a judicial discretion. A passage was referred to from *Hesketh* v. *Grey* (1), which was also before the King's Bench, where the Lord Chief Justice is reported to have said: "The ordinary is a judicial officer and is entrusted with a judicial power to accept or refuse resignations as he thinks proper." That, in my opinion, means this, that he has a discretion to be exercised judicially, not arbitrarily, but with a due regard to all the circumstances of the case. In another case also, *Heyes* v. *Exeter College, Oxford* (2), there is an expression which strongly confirms my view, because the Lord Chancellor there says: "The only doubt arises from this; that having made the resignation before a notary, duly qualified to receive it, the defendant did not leave it to him: nor did he mean himself to carry it to the Bishop: but he constitutes two other notaries to signify it to the Bishop. I found,

(1) 2 Phill. Eccl. Law, 1121; S. C. Amb. 268. (2) 12 Ves. 345.

however, on conversing with a person of great eminence in the Ecclesiastical Court, that this act of the Bishop is considered not a judicial, but a domestic, act: the law confiding to him, that he will not permit resignation for improper purposes." If this is not to be considered a judicial act that passage in the decree of the Council of *Lateran* in my opinion has no application to this case, and, at all events, ought not to bind us to hold that any particular form of assent is necessary; for what the decree is dealing with is the question, what is in ordinary circumstances the proper form in which the ordinary is to conduct his judicial proceedings. But the mere fact that any proceedings of the kind have been omitted would be a mere irregularity, not vitiating the act if otherwise effectually done. Moreover, I have heard nothing to satisfy me that that particular decree which was referred to has been adopted and acted upon in *England* as binding the Courts or as part of the law of the land.

Then it was said that *Heyes* v. *Exeter College, Oxford* (1), lays down that at least the signature of the Bishop was necessary in order to shew his assent. In my opinion it does nothing of the kind. In that case there was a signature of the Bishop to a formal document, as there was here, of acceptance, and declaring the benefice to be void, and when that was proved to be his signature, and proved to have been sent at a particular time, that decided the question as to whether the clerk had been duly presented by the defendants, the College, to the living, to which he could not have been presented if he held any other benefice at the time. But it is in no way laid down that signature was necessary, though when there was a signature to a formal acceptance, the question whether the Bishop had assented was at an end.

Before I leave this part of the case I ought to refer to what was pressed upon us, both in the opening and in the reply from the Constitution of *Othobon*, which I refer to from 1 *Phillimore's* Ecclesiastical Law, 510. That, in my opinion, is entirely inapplicable to the present case. It was merely dealing with that evidence which was necessary to be presented to a Bishop to shew that the benefice was void before the patron could present, and before the

(1) 12 Ves. 336.

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Bishop could institute, a clerk, not in any way dealing with the particular formalities required as to the assent of the Bishop to a resignation. And in the present case we have, if judicial declaration be required, a declaration by the Bishop that on the 1st of October the benefice was avoided by the resignation of the present Plaintiff. Mr. *Young* contended that the deed of resignation was executed in the diocese of *Salisbury*, and therefore that the declaration of the Bishop of *Salisbury*, and not of the Bishop of *Oxford*, would be necessary in order to enable *Queen's College* to present, or the Bishop to institute, a new clerk as on the avoidance of the living. But the whole argument on the part of the Appellant was that the mere deed was ineffectual, and that it is ineffectual till assented to by the Bishop. I think it became effectual by the assent of the Bishop, and that the resignation was in the diocese of *Oxford*, and not of *Salisbury*.

I have come also to the conclusion that no particular form of assent is necessary. Was there an assent by the Bishop previously to the 16th of July? In my opinion, if we are to look on the assent as not requiring any special form, there can be no doubt in the present case that there was perfect assent to the Plaintiff's resignation on the part of the Bishop, when he without objection received the deed of resignation as he did on the 3rd of June. Before the 3rd of June, at the Bishop's suggestion, assented to by the Plaintiff, the deed of resignation had been executed by the Plaintiff. When that deed of resignation was received by the Bishop without objection, it being one sent in at his suggestion and yielded to by the clerk, in my opinion the Bishop did fully express his assent to the resignation of the Plaintiff by receiving and accepting without any objection this deed of resignation sent in at his suggestion or at his instance.

Then there was another objection, which I must deal with before I leave this part of the case. Undoubtedly the Bishop did not then declare the benefice to be void; and he abstained from doing so out of kindness to the Plaintiff. But it was contended that in all the authorities which are referred to, the time when the power of revocation is said to be at an end is the time when the benefice becomes avoided, and, therefore, there could be no stop to the power of revocation till the benefice is avoided; and here

the Bishop, according to a promise he made, did not attempt to avoid the benefice till the 1st of October. I will deal presently with the question whether the act of the Bishop in that respect was good; but, in my opinion, the authorities do not enable the power of revocation to continue till the 1st of October in this case. The authorities referred to were dealing with a resignation to be acted on at once by the Bishop by declaring the benefice to be at once and from that time vacant; and therefore they say that when the Bishop's assent has been given to the resignation the benefice is void, and the power of *pœnitentia* is gone. But it is the assent of the Bishop, and not the avoidance of the living, which puts an end to the power of recalling the resignation. In my opinion, therefore, as far as we have gone, the objections do not prevail. There was a good deed of resignation; there was no power of revocation; and it was assented to by the Bishop.

But there are other objections raised, which are of a more serious and substantial character, which I will now deal with. It is said that, under the circumstances of this case, the resignation and the assent of the Bishop were void. It was put in this way, as I understand it, that the instrument of resignation sent in by the Plaintiff was subject to a condition, namely, the promise of the Bishop that the benefice should not be declared void till the 1st of October, and it was said that made the resignation entirely void. Undoubtedly, in one sense, that may be called a condition, and certainly it is English law that a resignation must not be subject to condition, except in one instance, where it is for the purpose of an exchange. But, in my opinion, this is not a condition which is touched by that rule of law, that a resignation must not be subject to conditions. It means that a resignation must not be subject to anything which will render it null and void on the happening or non-happening of any event. But here it was no condition in that sense. It was merely a postponement of the effect of the resignation, not by bargain of the Bishop, but his kind intimation of what he would do. It was a suspension of the avoidance in consequence of the resignation made by the clerk and accepted by the Bishop; and, in my opinion, that in no way affects the resignation, nor does it make what took place between the Bishop and the Plaintiff liable

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to any of the objections which have been raised. It was said it was like a contract to resign, which is bad. In my opinion it was not. The resignation was actually put into the hands of the Bishop, and the Bishop simply said, I am willing not to declare the benefice void till a future period. That was an arrangement, if you like to call it so, but it was not a contract. The Statute of *Elizabeth* enacts that there shall be, not simply no bargain about a resignation, but no corrupt bargain. The words of the statute are: "If any incumbent of any benefice with cure of souls, after the end of the said forty days, do or shall corruptly resign or exchange the same, or corruptly take for or in respect of the resigning or exchanging of the same, directly or indirectly, any pension, sum of money, or benefit whatsoever; that then as well the giver as the taker of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken, or had." It is impossible to suggest that what was done by the Bishop out of kindness to the Plaintiff was in any way corrupt. He thought it necessary for the parish and those committed to the care of the Plaintiff that he should resign his benefice; but there was no corruption: it was done honestly without any intention of securing any benefit to the Bishop, simply to allow the Plaintiff, for various reasons, to continue up to the 1st of October, on his promise to absent himself in the meantime. But could the avoidance be declared by the Bishop in this way? In my opinion it could. It is curious that in the *Incumbents Resignation Act* (34 & 35 Vict. c. 44), although not expressly giving or purporting to give any power to the Bishop to make a resignation effectual at a future time, there is a form given in the schedule as to the declaration of the Bishop accepting the resignation and declaring the benefice void; and in the 9th section of the Act there are these words: "If the patron shall have declared his consent or have not refused it as aforesaid, or if the Archbishop shall decide that the resignation shall be accepted, the Bishop shall cause a declaration as in Schedule B to be prepared, inserting therein the amount of pension so allowed out of the revenues of the benefice to the retiring incumbent, and the day, not being less than one month after the date of the declaration, when the incumbency shall be void." So that

there it is recognised that the Bishop can make the avoidance take place from a day after the time when the resignation is made, after the day when he has declared his acceptance. It is difficult to come to the conclusion, even if there were authorities in favour of the Appellant (for I do not think there are any), when an Act of Parliament is framed in that way, that it would be wrong or invalid on the part of the Bishop to suspend for a time the effect of a resignation, or to declare that the benefice was void as from a future day. In my opinion there is nothing wrong in it. This Court often, in making orders, directs them not to be drawn up for a particular time. That is suspending an order which has its effect as from the time it is pronounced. It might be that such a power could be used corruptly, if one could suppose that a Bishop could do such a thing. It might be that an arrangement as to suspending the operation, or suspending the time from which the benefice was void, might be done improperly; but in this case there is not the slightest ground for contending that such was the case.

There is only one other point I need refer to in this case, which is this. It was suggested during the course of the argument that the intention of the Bishop to accept the resignation so as to avoid the public scandal of taking proceedings in the Ecclesiastical Court against the Plaintiff, was contrary to law and public policy. In my opinion it was not. The resignation would be the same result as the highest penalty which the Ecclesiastical Court would have imposed, and, in my opinion, it cannot in any way be said to be contrary to public policy if the offending clerk is removed from the cure of souls to avoid the public disclosure of the act in reference to which the Bishop thought it right he should be removed.

In my opinion, all these objections to the resignation wholly fail, and the appeal must be dismissed.

LINDLEY, L.J.:—

The Plaintiff was in May, 1886, the rector of the parish of *Sparsholt*, in the county of *Berks*, in the diocese of *Oxford*. Before May, 1886, events had occurred which had created some scandal in the parish, and reflecting on the Plaintiff, and of sufficient

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importance to lead him to institute criminal proceedings against their authoress. In the course of these proceedings the Plaintiff gave evidence on a trial at the Assizes, held at *Reading*, and he then admitted some acts of immorality on his part, but not, as I understand, in the parish or neighbourhood of *Sparsholt*, nor with the woman whom he prosecuted. That woman was acquitted of one of the charges against her and the other was then withdrawn. The scandal was not removed by these proceedings, and the Bishop of the diocese felt it his duty to interfere. A correspondence took place between him, his secretary Mr. *Davenport*, and Dr. *Wellings*, the rural dean, on the one part and the Plaintiff on the other part, which led to the Plaintiff sending in his resignation of his living to the Bishop upon certain understandings, which will be alluded to presently. [His Lordship read the letters from the 8th of May, 1886, to the 2nd of June, 1886, and continued:—] The resignation was dated the 2nd of June, 1886. It was in the usual form, signed and sealed by the Plaintiff and attested by two witnesses, but not by a notary public. It was sent by the Plaintiff to the Bishop's secretary by post and was received by him on the 3rd. Shortly afterwards, but when, exactly, does not appear, the Bishop's secretary laid the resignation before the Bishop in order that he might sign his acceptance of it. The acceptance was a printed form on the same sheet of paper as the resignation, with blanks for the date and other matters. The blanks, with the exception of that for the date, were filled in in ink by the secretary before the Bishop signed it. The blank for the date was filled in in pencil: and the date thus filled in was the 1st of October. The Bishop signed this acceptance with the date left in pencil, and returned it to his secretary, who put it away in its proper place in his registry.

The fact that the Plaintiff had resigned his living was communicated to the parishioners and to the patrons early in June.

On the 16th of July, but whether before or after the Bishop had signed the acceptance of the Plaintiff's resignation is not clear, the Plaintiff withdrew his resignation. It appears that he had executed an instrument withdrawing it as early as the 10th of June; and had had it attested by a notary on the 11th; but the Plaintiff did not disclose that fact to the Bishop until the

16th of July. The Bishop declined to recognise the right of the Plaintiff to withdraw his resignation; and after some correspondence, the Bishop, on the 1st of October, formally declared his acceptance of the Plaintiff's resignation and declared the living void as from that date.

On the 14th of September the Plaintiff commenced this action, and moved for an injunction to restrain the Bishop from acting on the Plaintiff's resignation, and from instituting any other person into the benefice of the Plaintiff. The injunction thus sought was refused. The patrons of the living were afterwards added as parties to the action, and it came on for trial before Mr. Justice *North*, who dismissed it with costs. From this decision the Plaintiff has appealed to this Court.

Before proceeding to notice the various points of law raised by the Appellant, it will be convenient to allude to one or two questions of fact.

The correspondence warrants the inference, and I infer, that there was an understanding, although no express promise, that if the Plaintiff resigned no proceedings against him should be taken by the Bishop. The correspondence also shews that it was agreed between the Plaintiff and the Bishop that the Plaintiff's resignation should not be accepted so as to avoid the living before the 1st of October, 1886. The legal consequence of this will be examined hereafter. It was further arranged that the Plaintiff should have leave of absence until the 1st of October, and although no formal leave of absence was asked or given the Plaintiff in fact left the parish on the faith of this arrangement. It is perfectly clear from the correspondence in May, that the Plaintiff sent in his resignation at the request of the Bishop in order that further scandal and hostile proceedings against the Plaintiff might be avoided. It is also plain that the resignation required by the Bishop was one on which he could act on the 1st of October; and that a resignation which might be revoked by the Plaintiff before that date would have been useless for the purpose for which alone it was required. The Plaintiff has sworn that he never intended to resign absolutely and finally without retaining the power of revoking his resignation before the time fixed for its acceptance; and he appeals to his execution

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of a deed of revocation and to his going before a notary on the 10th and 11th of June, in proof of this contention. I have read this part of the Plaintiff's evidence with pain; for even if when he sent in his resignation he did not intend it to be final and absolute (which I cannot bring myself to believe), it is clear that no hint of any such understanding was conveyed to the Bishop. In dealings between man and man, unexpressed beliefs, meanings, or intentions can only be regarded (if at all) when they are consistent with good faith and with the expressed intentions and objects of both parties; and it would, in my judgment, be contrary to sound legal principles to give effect to the Plaintiff's belief or understanding that he was to be at liberty to revoke his resignation before the 1st of October, even if his evidence on this point could be believed.

The Plaintiff has also deposed that he sent his resignation to the Bishop's secretary with instructions not to lay it before the Bishop before the 1st of October. This is denied by the Bishop's secretary, and is not supported by the written authority signed by the Plaintiff nor by the correspondence; and cannot be accepted as true.

The points of law relied upon by the Plaintiff were mainly two, viz., first, that the resignation was wholly void; and, secondly, that it was revocable, and had been revoked before it had been accepted by the Bishop. The contention that the resignation was void was based on two grounds—one of form and one of substance. The objection to the resignation in point of form was that it was not attested by a notary. It is laid down in books of authority, *e.g.*, *Gibson's* Codex (1) and *Burns'* Ecclesiastical Law (2) "that in practice there is no way (as it seemeth) of resigning, but either to do it by personal appearance before the ordinary or at least to do it elsewhere before a public notary." But although it may be quite true that the Bishop may decline to receive a resignation made in any other way, no authority was cited to shew that a Bishop cannot dispense with those formalities and accept a resignation of the genuineness of which he is satisfied by the evidence. In this particular case the Bishop's secretary in his letter of the 31st of May, which accompanied the form of

(1) Page 822. (2) 9th Ed. vol. iii. p. 541.

resignation to be executed by the Plaintiff, expressly informed the Plaintiff that attestation by a notary would not be insisted upon. Under these circumstances, and finding no authority to the effect that the Bishop cannot lawfully waive the observance of the formalities usually required, I am of opinion that it is competent for him to do so, and that the Plaintiff's resignation cannot be held invalid on the ground of its non-attestation by a notary.

The objection to the resignation in point of substance was that it was accompanied by an agreement or understanding or by a condition or qualification which rendered it void in point of law. I have already stated what these were. It is contended that every resignation must be made *purè, sponte, absolute et simpliciter*, and that the Plaintiff's resignation was not of this nature. It is to be observed that the instrument of resignation is in the nature of a deed-poll. Resignation is the act of the incumbent; the instrument is his deed; the words of it are his words. The words are: "I, ——, for certain just and lawful causes me thereunto especially moving, without compulsion, fraud, or deceit, purely, simply, and absolutely resign and give up my vicarage," &c. Those words are the incumbent's solemn assurance to his Bishop that the resignation is one which the Bishop may safely and properly accept, and that there is nothing simoniacal or otherwise improper in the transaction.

Now the Bishop was insisting on an unconditional resignation; and the Plaintiff knew this, and he sent in his resignation accordingly in the form in which he was required to make it. He cannot now turn round and obtain relief upon the ground that his resignation was not in truth what he solemnly declared it to be: See *Rumsey* v. *Nicholl* (1). This action is one in which the Plaintiff is asserting rights based on a transaction to which he was a party, and which he now impeaches on the ground of illegality. It is contrary to well-settled legal principles to give relief in such a case. No doubt if he were being sued by others it would be competent for him to defend himself by shewing the illegality of the transaction on which their right to relief was founded, and the Plaintiff would not be estopped by his own deed from proving such illegality: *Collins* v. *Blantern* (2); but

(1) 2 C. P. D. 179. (2) 1 Sm. L. C. 8th Ed. p. 387.

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the position of a Plaintiff seeking relief is wholly different; and to grant to the Plaintiff equitable relief in the shape of an injunction upon the ground that his resignation was illegal and void is quite out of the question.

It would not, however, be satisfactory to dispose of the question of illegality on the ground that assuming it to be established the Plaintiff could not take advantage of it. Having regard to the frame of the action and the argument addressed to the Court upon it, the Court, in my opinion, ought to declare what the rights of the parties really are, and decide the question really in dispute between them, viz., whether the Plaintiff's living did or did not become void on the 1st of October, 1886. The decision of this question renders it necessary to determine whether the Plaintiff's resignation really was void or not. The determination of this point involves the solution of the following questions, viz.: 1. What was the effect of the arrangement between the Plaintiff and the Bishop that he should not accept the Plaintiff's resignation before the 1st of October, 1886? 2. What was the effect of the understanding that if the Plaintiff resigned the Bishop would not proceed against him under the *Church Discipline Acts?* In my opinion neither of these understandings affected the validity of the resignation. It was said that they made it conditional and therefore void. But, as already pointed out, the resignation does not express or purport to express or negative any agreement with the Bishop; and I am by no means satisfied that the rule which requires resignations to be absolute excludes terms and conditions of whatever nature which the incumbent may make with his Bishop.

In the next place these so-called conditions are not conditions in the legal sense of the word. A promise not to proceed under the *Church Discipline Act,* assuming such promise to have been made, would be a mere collateral promise, not a condition affecting the resignation itself. Such a promise neither postpones the resignation nor defeats it. Nor would a breach of the promise render the resignation inoperative. Still less is the postponement of the time for avoidance a condition in the proper sense of the term. The difference between annexing a condition to an act such as a promise or resignation and fixing a time at which it is to take effect is familiar to every lawyer. A promise to pay a sum

of money at a future time is not a conditional promise; nor is a resignation to take effect at a future named day a conditional resignation. The resignation is absolute although its operation is deferred.

It would not, however, be satisfactory to dispose of this part of the case on any merely technical ground. It is desirable to examine the matter further; for collateral promises or even honourable understandings if contrary to law may make a resignation void. They may shew that the resignation was really part of a transaction which was simoniacal or corrupt within the meaning of the statute 31 Eliz. c. 6, ss. 5 to 8. But I can find nothing in this case either simoniacal or corrupt. The Bishop had to consider his duty to the Plaintiff's parishioners and to the Church; and he came to the conclusion that it would be best for them if the Plaintiff resigned without further scandal; he also came to the conclusion that it was not necessary immediately to avoid the living, and that he could consistently with his duty postpone the avoidance of the living until the 1st of October if the Plaintiff desired it, which he did. No authority has been cited to shew that the Bishop could not properly and lawfully act as he did. If he could secure the removal of the Plaintiff from the parish and could also avoid further scandal, there is no legal reason why he should not do so. There is no law which compels him to proceed against the Plaintiff under the *Church Discipline Act*. The promise to postpone the avoidance of the living for a few months did not in my judgment in any way affect the validity of the resignation. The postponement was a kind concession to the Plaintiff and was injurious to no one.

It is impossible to bring such a transaction as this within either the words or the spirit of 31 Eliz. c. 6, s. 8; and equally impossible to treat it as simoniacal. There is no authority to shew that a Bishop cannot for good and sufficient reasons lawfully postpone the coming into operation of a resignation which he has received and which he has approved. On the other hand, there is evidence that such a practice is common in the diocese of *Oxford*. It has obvious conveniences, it is permitted by the *Incumbents Resignation Act* (34 & 35 Vict. c. 44), s. 9 and Schedule; such a power may undoubtedly be abused, but its liability to abuse does not shew that the power does not exist.

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In the absence of authority I cannot hold that a resignation is invalid because it is made on the understanding or faith of a promise by the Bishop that it shall not come into operation the moment it is made. The decisions on resignation bonds do not touch this point; nor do the principles on which they proceed apply to a case like the present. A promise or understanding of the kind in question may in some circumstances be corrupt or simoniacal, and will if corrupt or simoniacal render a resignation on the faith of it illegal and void: but there is nothing of the sort in this case. Where, as here, the avoidance of the living is promised to be postponed by the Bishop for a reasonable time and *bonâ fide* with a view to the interest of all parties concerned, a resignation made on the faith of such promise in order to avoid scandal and legal proceedings under the *Church Discipline Act* is in my opinion legal and unimpeachable.

There remains for consideration the question whether the resignation sent in by the Plaintiff was revocable before the 1st of October, which was the time from which it was to take effect. Speaking generally, a resignation is revocable until it has been accepted by the Bishop; and when it is accepted by him the living becomes void. But the authorities cited in support of this proposition are not addressed to the question whether an incumbent can revoke a resignation sent in by him to his Bishop at the Bishop's request and in order to avoid scandal and possible legal proceedings. I can find no authority which requires the Bishop's approval to be signified in any particular form, although in order to avoid disputes the acceptance is usually put into writing and signed by the Bishop. A resignation sent in under the circumstances now supposed is in fact approved before it is sent in, and in the case supposed no further approval appears to me necessary in order to render the resignation irrevocable. There is an ambiguity about the word "acceptance" which is apt to mislead. I am not at all sure that the words "*admissio*," "*approbatio*," "*consensus*," and the like used by *Van Espen* and other canonists, mean such an acceptance of a resignation as avoids a living. It no doubt very often happens that all those expressions mean the same thing. But I am not aware of any authority which shews that an approval of a resignation is necessarily such an acceptance of it as immediately avoids the living contrary to the inten-

tions as well of the incumbent as of the Bishop. If, however, the law were as the Plaintiff contends, the only effect would be that his living would necessarily become void earlier than he intended. But this would not help him in this litigation. If he was right both he and the Bishop would have made a mistake on a matter of law, and such a mistake would not entitle the Plaintiff to relief.

In the view here taken of the facts and of the law it is unnecessary to determine exactly when the Bishop affixed his signature to the acceptance of the Plaintiff's resignation. Whether the acceptance was signed before or after the attempted revocation is in my opinion immaterial. It is plain as a matter of fact that the Bishop never intended his signature to operate as such an acceptance of the Plaintiff's resignation as then and there to avoid the living. The acceptance in this sense was never intended to come into operation until the 1st of October, when it was formally announced. To hold that, under the circumstances of this case, the Plaintiff could legally withdraw his resignation after he had sent it in, would be to hold that the Plaintiff could lawfully commit a gross breach of faith; and in the absence of any authority which requires the Court to hold that he has a right so to act, he ought to be held not to have it.

For the reasons above stated, I am of opinion that the Plaintiff's appeal fails, and ought to be dismissed with costs. But the order of the Court ought in my opinion to be prefaced by a declaration that the benefice of *Sparsholt* became void on the 1st of October, 1886, by reason of the resignation of the Plaintiff on the 2nd of June, 1886, with the approval and consent of the Bishop of *Oxford*, and his acceptance thereof, as on and from the 1st of October, 1886, and that the attempted revocation by the Plaintiff of such resignation after the receipt thereof by the Bishop was invalid and void.

LOPES, L.J.:—

At the time when the correspondence between the Appellant and the Bishop commenced, the Appellant had, by his misconduct, rendered himself liable to be proceeded against under the *Church Discipline Act;* and the Bishop having regard to the

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grave scandal occasioned by that conduct, unless the Appellant at once resigned his benefice, would have failed to discharge his duty if he had not directed such proceedings to be taken. In these circumstances a correspondence took place, the meaning and effect of which is most important to consider. A careful and anxious consideration of that correspondence has led me to the conclusion that there was an absolute and unconditional resignation of his benefice by the Appellant in June, subject to an understanding that the benefice was not to be avoided until the 1st of October. The resignation was suggested by the Bishop, acquiesced in by the Appellant, and approved of by the Bishop when received by him. The resignation was, in my opinion, *factum et probatum*, when the Bishop received it on the 2nd of June. This resignation I am of opinion the Appellant had no power afterwards to withdraw. It was intended both by the Appellant and the Bishop that it should be absolutely irrevocable. Directly it was received by the Bishop the resignation was complete, subject only to an understanding that the effect and the consequences of the resignation were to be suspended until the 1st of October. There was much argument with regard to the meaning of the word "*admissio*." In my opinion "*admissio*" and "*probatio*" are equivalent terms, both meaning acquiescence, or approval.

I will now shortly consider the grounds on which the Appellant seeks to impeach his resignation. It is said that the deed of resignation is invalid because it was not executed before a notary public. There are several ways in which a valid resignation may be made. All these modes appear to have for their object the protection of the Bishop, and are intended to secure him from the consequences of a mistake in avoiding a benefice. One of these modes is the execution of a deed of resignation before a notary public. I am of opinion that the execution of such a deed before a notary public is a formality for the protection of the Bishop which he may waive if he thinks fit. The Bishop waived this formality, and the deed is not on this ground invalid.

It was also contended that the deed was illegal because a collateral condition was attached. The Appellant says, "I resigned

on the understanding that the benefice was not to be avoided until the 1st of October." Excepting only the case where the resignation is made for the sake of effecting an exchange, it is undoubted law that the resignation must be *purè, spontè, absolutè, et simpliciter*, and no collateral condition by which in certain events the resignation may be defeated can be annexed. The object was, no doubt, to exclude all corrupt or indirect bargains for money or any other valuable consideration. The object the Bishop had in view when he undertook not to give effect to the resignation and not to avoid the benefice until the 1st of October is too clear for controversy. It was done in mercy and out of extreme leniency towards the Appellant. The understanding, therefore, relied upon cannot be impeached on the ground that it was prompted by any indirect motive. It must be regarded, as in truth it was, as an honest stipulation. But was it in any sense of the word a condition by which the resignation was to be defeated? The Bishop, according to my view, had in June in the most unequivocal way accepted the resignation of the Appellant, and would not have permitted it in any circumstances to be defeated or superseded. Out of extreme kindness he suspends its operation until the 1st of October. I know of no authority or law which prevents the Bishop from so doing for honest and good reasons. In certain circumstances it would be highly inconvenient if the ordinary could not postpone for a reasonable time the avoidance of a benefice after he has approved the resignation of a clerk. Such a postponement cannot be said to be a condition annexed to the resignation, and neither on authority nor on principle can it be held to make the Appellant's resignation invalid.

I feel it unnecessary, after the judgments which have been delivered, to go into the matter at such length as the other members of the Court, who have so exhaustively dealt with it. I should only be repeating what they have said, with all of which I agree.

Solicitors for Plaintiff: *Hyde, Tandy & Mahon.*

Solicitors for Bishop of *Oxford: Cunliffes & Davenport,* agents for *T. M. Davenport, Oxford.*

M. W.

C. A.
1886
KAY, J.
Nov. 10.
C. A.
1887
March 21, 22.

In re LADY HASTINGS.
HALLETT *v.* HASTINGS.

[1885 H. 843.]

Married Woman—Separate Estate—Simple Contract Debt—Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 3 [*Revised Ed. Statutes, vol. i., p.* 705].

In 1875 a married woman borrowed money from her husband upon a parol agreement to repay him the amount with interest out of her separate estate. She died in 1884, without having paid anything in respect either of interest or principal, and without having given any acknowledgment in writing of her liability to repay the debt. After her death her husband claimed repayment:—

Held (affirming the decision of *Kay*, J.), that the debt was barred by analogy to the *Statute of Limitations*.

Norton v. *Turvill* (1) explained.

ADJOURNED SUMMONS.

On the 1st of April, 1875, Mr. *Robert Heane*, who was then the second husband of the testatrix, Lady *Hastings*, paid in to her separate account at her bankers the sum of £400 without taking any security in writing for the same.

Lady *Hastings* died in December, 1884. Meanwhile she had never made any payment of interest or principal in respect of this £400, or given any acknowledgment in writing of her liability to repay it, but one witness, a Mrs. *Patten*, gave evidence that Lady *Hastings* had in her lifetime verbally admitted to the witness that the money had been lent her by her husband. There was also evidence that the £400 was applied by Lady *Hastings* in payment of part of a debt owing by her to a builder for repair and restoration of a residence which was occupied by herself and Mr. *Heane*, in which residence Mr. *Heane* had, under the settlement executed upon his marriage with Lady *Hastings*, a life interest after her death.

After Lady *Hastings*' death this action was instituted (*inter alia*) for the administration of the trusts of her will and marriage settlement, and judgment was given therein on the 12th of January, 1886, whereby (*inter alia*) an inquiry was directed whether Lady *Hastings* was at the time of her death indebted to

(1) 2 P. Wms. 144; 2 Eq. C. Ab. 152.

her husband in any and what sum of money which her separate estate was liable to pay. In the course of the proceedings Mr. *Heane* carried in a claim to rank as a creditor against her separate estate for the above-mentioned sum of £400 and interest, and in support of it gave evidence that the £400 was advanced upon a parol agreement by Lady *Hastings* that she would repay it with interest at 5 per cent. out of her separate estate. The claim was disputed by the executors and disallowed by the Chief Clerk, and this was a summons taken out by Mr. *Heane* to vary the Chief Clerk's certificate in that respect.

It appeared that Lady *Hastings* was at the time of her death possessed of certain separate estate, consisting of furniture and household effects, which was available for the payment of Mr. *Heane's* debt if it was established. And it also appeared that such part of the property comprised in the settlement made upon her second marriage as produced income was settled upon her for life for her separate use without power of anticipation, and subject thereto, in the event which happened of her death before Mr. *Heane*, and without children of the marriage, to such persons as she should appoint by will. In exercise of this power she by will, dated in February, 1880, appointed her property to her nephew and niece, who were respectively Plaintiff and Defendant in this action.

The summons came on for hearing before Mr. Justice *Kay* on the 10th of November, 1886.

Fischer, Q.C., and *J. G. Wood*, in support of the summons:—

This was not a gift, but a loan on the security of a wife's separate estate; and Mr. *Heane*, having acquired an interest in Lady *Hastings'* separate estate which is not defeated by any provision of any *Statute of Limitations*, is entitled as against the trustees of his late wife's separate estate to have such interest satisfied thereout.

A debt due from a married woman to a stranger, and payable out of funds held in trust for her separate use, is not barred by lapse of time under the *Statute of Limitations*: *Hodgson* v. *Williamson* (1); *Norton* v. *Turvill* (2).

(1) 15 Ch. D. 87. (2) 2 P. Wms. 144; 2 Eq. C. Ab. 152.

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And a married woman can contract with her husband in respect of her separate estate: *Woodward* v. *Woodward* (1).

[KAY, J., referred to *Lillia* v. *Airey* (2) and sent for the record of *Norton* v. *Turvill* (3) in the Registrar's book.]

Hastings, Q.C., and *Phipson Beale*, for the residuary legatee under the will of Lady *Hastings*:—

There is nothing whatever in the way of acknowledgment in writing or part payment to take the case out of the operation of the statute, nor is it a case in which the exception in favour of trusts is applicable, and the debt is accordingly barred under the statute 21 Jac. 1, c. 16, s. 3. At any rate the general engagements of a married woman can only be enforced against so much of the separate estate to which she was entitled free from restraint upon anticipation at the time the engagement was entered into as remains when judgment is given, and cannot be enforced against any separate estate to which she became entitled after the time of the engagement: *Pike* v. *Fitzgibbon* (4); *Johnson* v. *Gallagher* (5); *Heatley* v. *Thomas* (6).

[KAY, J., referred to *Vaughan* v. *Walker* (7).]

Moreover the evidence shews that the £400 alleged to have been advanced was expended by Lady *Hastings* upon the residence which was occupied by Mr. *Heane* and herself, in which he had a life interest in remainder, and the presumption of a loan is thus rebutted by the position of the parties.

Fischer, in reply.

KAY, J.:—

In this case a question of very great interest and importance has been raised, and as it has been elaborately argued during nearly an entire day, I do not see that any advantage will be derived from delay in expressing my judgment upon it; and having formed a very strong and clear opinion, I shall endeavour

(1) 3 D. J. & S. 672.
(2) 1 Ves. 277.
(3) 2 P. Wms. 144; 2 Eq. C. Ab. 152.
(4) 17 Ch. D. 454.
(5) 3 D. F. & J. 494.
(6) 15 Ves. 596.
(7) 8 Ir. Ch. Rep. 458.

to state it as explicitly as possible, in order that those who dissent from it, may, if they think it wrong, be able readily to obtain a reversal.

The question, stated shortly, is this: In the case of a claim in the nature of a simple contract against a married woman who has separate estate, will or will not a Court of Equity act by analogy to the *Statute of Limitations?* In other words, if such a claim arose more than six years ago, and has not been kept alive by an acknowledgment, can it be asserted against the married woman, or against her estate, if she be dead, without any danger of being met by the answer, "Your claim is barred by analogy to the *Statute of Limitations*"?

Before I consider the authorities, let us look at the matter on principle. It is now settled beyond all power of dispute what the nature of such a claim is. In the well-known case of *Johnson* v. *Gallagher* (1), Lord Justice *Turner* states this: "The doctrine of appointment seems to me, however, to be exploded (*Owens* v. *Dickenson* (2) and *Anon.* (3)); and it is scarcely less clear that the transactions do not create any lien or charge on the separate estate. It may well be asked, then how do they operate? I think the answer to this question is to be found in *Hulme* v. *Tenant* (4). When a man contracts debt, both his person and his property are by law liable to the payment of it. A Court of Equity, having created the separate estate, has enabled married women to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may. This Court, therefore, as I conceive, gives execution against the property just as a Court of Law gives execution against the property of other debtors. *Hulme* v. *Tenant* seems to have proceeded upon this ground, and Lord *Eldon* seems to have considered it to be the right ground, for in *Nantes* v. *Corrock* (5) we find him refusing to enforce the claim of a creditor against the separate estate, on the ground that it consisted of stock which could not be taken in execution at law. In my opinion this is the true footing on which these cases

(1) 3 D. F. & J. 494, 519.
(2) Cr. & Ph. 48.
(3) 18 Ves. 258.
(4) 1 Bro. C. C. 15.
(5) 9 Ves. 182.

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stand. It is to be considered then what are the consequences which result. A legal debtor may alien his property before it is bound by judgment or execution. Why may not a married woman do the same as to her separate property? Her creditors are not appointees of the property. They have no lien or charge upon it. She may contract other debts, and all her creditors will be paid *pari passu: Anon.* (1). She may thus exhaust the fund by contracting fresh debts," and so on.

If that is a correct statement of the law, it is quite plain that a creditor, who contracts what would have been called a "simple contract debt" with a married woman, on the faith of that married woman having separate estate, acquires no lien upon it, but can only attack the separate estate in a proceeding to which the married woman, or, if she be dead, her executors, must be parties, and then he gets his remedy against it by way of execution. Now, if that be so, on what ground can it be said that the Court of Chancery is, with respect to the *Statute of Limitations*, to treat a claim of that kind in any other way than it would treat a simple contract claim against a man or a person not under disability? Would it be a just thing that the Court of Equity should say—"We act, and always have acted from the earliest times, in respect of equitable claims by analogy to the *Statute of Limitations* in cases to which the statute does not in terms apply, but in this case of a married woman we refuse to act upon that analogy?" The creditor of a married woman would be able, if that were the law, not only to obtain execution against the separate estate of a married woman—it is settled now that it can only be against such separate estate as she had at the moment the debt was contracted—but he would be able to obtain execution against that separate estate after the lapse of any number of years, no *Statute of Limitations* or any analogy to any *Statute of Limitations* applying to the case or barring his remedy. I can only say if that be the law, it seems to me to be a monstrous law which cannot possibly be reconciled with that which has been the doctrine of the Court of Chancery from the earliest time, that it always will act, where the statute does not apply in terms, by analogy to that statute.

(1) 18 Ves. 258.

In this case on the 1st of April, 1875, Mr. *Heane*, who was then married to Lady *Hastings*, handed to her £400. I will assume for the purpose of this part of the case that it was a loan; that is a matter which is in contest. She lived after that until the 10th of December, 1884, and nothing in the way of part payment or acknowledgment has been proved. So that if she had been a person not under disability, and the loan had been made under ordinary circumstances, it would clearly have been barred at her death. Of course, nothing that has happened since could set it up again, if it was then barred. The question now arises under an inquiry in which the husband comes in as a creditor. It is not a case in which there are any other proceedings between the husband and the estate of the wife with reference to this claim. It is a claim brought in by a creditor, and therefore I must treat it as being perfectly legitimate, on the part of those who are protecting the estate of the wife, to set up the *Statute of Limitations*. Those are the short facts.

Now I turn to the authorities. The authority upon which it is said that the contrary doctrine is based is the case of *Norton* v. *Turvill* (1). I have sent for the Registrar's book, and I find that the facts of that case are accurately stated in the appendix to the 8th volume of the Irish Chancery Reports. It appears, stating the short result, that in that case the *feme covert*, who had separate property, gave a bond, and the time when she gave the bond was August, 1709. This is from the Registrar's book, The said *Sarah Vernatti*, in August, 1709, lent the said *Edith* £25, and took her bond of £50 penalty to pay the £25, with interest, on the 27th February, 1779—I think there must be an error in the date there.—The wife made her will in 1715, and she died about February, 1715. It would, therefore, seem that she died within six years from the date of the bond, and that a simple contract debt would not have been barred at her death. She had, however, in that case property, which she had the power of appointing by deed or will; and the report of the case, which is very shortly given in 2 *Peere Williams*, states that the *Statute of Limitations* being set up by way of answer, the defendant was entitled to the benefit of it though he had not pleaded it. "But

(1) 2 P. Wms. 144.

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in this case"—this is stated in the judgment of the Master of the Rolls—"all the separate estate of the *feme covert* was a trust estate for payment of debts, and a trust is not within the *Statute of Limitations*." As far as I can gather from reading the report of this case in the Registrar's book, there was no trust whatever for the payment of debts except in the way I am about to state. I find that this case was explained afterwards by Lord *Alvanley* in the case of *Sockett* v. *Wray* (1), in these words: "In *Norton* v. *Turvill* (2), the disposing power was not confined to being executed by a will. The question there was, as to the execution by bond"—that is, of course, the execution of the disposing power—"The Master of the Rolls was of opinion, that though as a bond it was void, it was a good disposition against persons claiming under her will, and that where a person having a disposing power, gives a bond, it is binding on her personal property." Now it is obvious that this construction of the decision in *Norton* v. *Turvill* makes it very intelligible. The bond was treated as though it had been an appointment of so much separate property, and then, of course, the trustee of the separate property became a trustee for the bondholder to the extent of that appointment; and that explains the words used by the then Master of the Rolls.

It does not rest there alone, because that explanation was repeated by Sir *William Grant* in *Heatley* v. *Thomas* (3). He said in the course of the argument, "The question is, whether this"—that is the property in that case—"was separate property to all intents and purposes," and then he continues thus (4): "In *Sockett* v. *Wray*, Lord *Alvanley* did not consider a married woman, who had only a power of appointment by will"—that was the distinction between *Sockett* v. *Wray* and *Norton* v. *Turvill*—"as having separate property; distinguishing that case from *Norton* v. *Turvill*, where the creditor was allowed to resort to the separate property after the death of the wife; as she had a power of appointing either by deed or will. Upon the question in *Sockett* v. *Wray*, whether the wife could give the property to her husband, Lord *Alvanley* held, that she could not; that she could not affect it in any way but by a revocable instrument; and the

(1) 4 Bro. C. C. 483, 487.
(2) 2 P. Wms. 144.
(3) 15 Ves. 596.
(4) Ibid. 603.

bond was an instrument not revocable," so that Sir *William Grant* adopts Lord *Alvanley's* explanation of *Norton* v. *Turvill* (1) exactly.

Well I find that is not all the authority on the subject, because in the case of *Johnson* v. *Gallagher* (2), which I have already referred to, the matter was mentioned again, and Lord Justice *Turner* says (3): "In *Norton* v. *Turvill*, as explained in *Sockett* v. *Wray* (4), the exercise of the power by the will of the married woman seems to have been held to let in a bond creditor against the appointees under the will." This is scarcely a full exposition of Lord *Alvanley's* explanation. Lord *Alvanley* treats the bond as having been itself an appointment, which made the bond creditor an appointee under the will.

I should have thought that would settle the matter completely, particularly when one remembers that the case of *Johnson* v. *Gallagher* has received the highest possible approbation from the Privy Council in the judgment read by Lord Justice *James* in the case of *London Chartered Bank of Australia* v. *Lemprière* (5). There the property of the married woman was settled by an ante-nuptial settlement for her use for life with remainder as she should by deed or will appoint, and in default of appointment, to her executors or administrators. She executed the power by will, and in that case Lord Justice *James* reads the language of Lord Justice *Turner* in *Johnson* v. *Gallagher*, and says: "It is said, indeed, that the Lord Justice *Knight Bruce* did not concur with his colleague, and that Lord *St. Leonards* has expressed an opinion that the Lord Justice *Knight Bruce's* view was the more correct," and then he says further on, "Their Lordships are not able to concur in that view of the authorities, and have arrived at the conclusion, that Lord Justice *Turner's* judgment is expressed with his usual accuracy." And in this very case, *Sockett* v. *Wray* is again referred to, and the observations of Sir *William Grant* in *Heatley* v. *Thomas* (6), which I have read, are read by the learned Judge in giving judgment.

So that there is a very considerable body of authority which

(1) 2 P. Wms. 144.
(2) 3 D. F. & J. 494.
(3) Ibid. 517.
(4) 4 Bro. C. C. 483.
(5) Law Rep. 4 P. C. 572, 593, 594.
(6) 15 Ves. 596.

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has construed that decision in *Norton* v. *Turvill* (1), and has explained that those words, which say that there was a trust, are used because at that date the understanding was that a married woman having a power of appointment over property by deed or will, and giving a bond, by giving that bond exercised the power of appointment to that extent. But it would seem that in two other cases the decision has not been so understood; one is a case which occurred in *Ireland*, a case I have already mentioned, *Vaughan* v. *Walker* (2), where the learned Judges, the Lord Chancellor of *Ireland* and the Lord Justice of Appeal, differed, the Lord Justice of Appeal thinking that the *Statute of Limitations*, or the analogy of the statute, did affect such a claim, and the Lord Chancellor thinking it did not, simply upon the authority of *Norton* v. *Turvill*. But it is remarkable that in that case neither *Sockett* v. *Wray* (3) nor *Heatley* v. *Thomas* (4) was cited, and the explanation of *Norton* v. *Turvill*, which for so many years has been accepted, was never referred to in any way.

Another case has been mentioned, the case of *Hodgson* v. *Williamson* (5), in which *Norton* v. *Turvill* and *Vaughan* v. *Walker* seem to have been followed. Again, in that case, I cannot find that either *Sockett* v. *Wray* or *Heatley* v. *Thomas* was mentioned, or that this explanation of the decision in *Norton* v. *Turvill* was referred to, although I do see that the *London Chartered Bank of Australia* v. *Lempriere* (6) was cited. It is not possible for me to reject that explanation of *Norton* v. *Turvill*. I myself should not profess to understand *Norton* v. *Turvill* in any other way but that.

If so, as the doctrine now is quite settled that a bond given by a married woman who has separate property is not an appointment out of her separate estate, it follows as a matter of course that a simple contract debt cannot be; and therefore, whatever the question may be as to a bond, there is no reason in the world, and there is no authority, for saying that a simple contract debt contracted by a married woman shall not be treated in equity as barred by analogy to the *Statute of Limitations*. That is the point on which I decide this case, and therefore I do not enter

(1) 2 P. Wms. 144.
(2) 8 Ir. Ch. Rep. 458.
(3) 4 Bro. C. C. 483.
(4) 15 Ves. 596.
(5) 15 Ch. D. 87.
(6) Law Rep. 4 P. C. 572.

into the other question, namely, whether or not there is sufficient evidence that this was a loan, or any other point that has been raised about it. I must say that those are points which deserve consideration; but I wish to rest my judgment on this point alone, because it seems to me a point of very great importance, and I have a very clear and a very strong opinion upon it; and if my opinion be wrong it is well that it should be carried to the Court of Appeal and the decision of that Court taken with the least possible delay.

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W. W. K.

From this judgment Mr. *R. Heane* appealed. The appeal came on for hearing on the 21st of March, 1887.

C. A.

Fischer, Q.C., and *J. G. Wood*, for the Appellant:—

The evidence is sufficient to prove that the money was actually advanced as a loan by Mr. *Heane* to his wife, and there has been no repayment of any part of the principal.

With respect to the *Statute of Limitations*, it is not pretended that the case comes within the letter of the statute, but it is said that the debt, being an equitable debt, is barred by the analogy of the statute. But the equitable application of the statute only has reference to cases where there is a right to sue for the debt in equity, and the statute only begins to run from the time when such suit can be brought. In the present case, the husband could not have sued his wife personally for the debt at any time during her life. Nor could he have taken proceedings against her separate property, for she had no trustee except her husband, and he could not have brought an action against himself. *Norton* v. *Turvill* (1) is a distinct authority in our favour. That case has been explained by supposing that the bond operated as an appointment in favour of the creditor; but there is nothing in the judgment of the Master of the Rolls to shew that he rested his judgment on that view. The judgment equally applies to a simple contract debt like ours: *Vaughan* v. *Walker* (2); *Sockett* v. *Wray* (3); *Heatley* v. *Thomas* (4). Such parts of Lady *Hastings*'

(1) 2 P. Wms. 144; 2 Eq. C. Ab. 152.
(2) 8 Ir. Ch. Rep. 458.
(3) 4 Bro. C. C. 483.
(4) 15 Ves. 596.

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estate as she appointed by her will under her power became assets for payment of her debts, and we are entitled to be paid out of them: *Hodgson* v. *Williamson* (1).

Hastings, Q.C., and *Phipson Beale*, for the Respondent, were not called upon.

COTTON, L.J.:—

The question for our decision in this case is one of considerable importance. It is said that a loan of £400 was made to Lady *Hastings* by her husband in 1875, and that this loan has never been repaid; and it is contended that this loan is payable out of her separate property, or out of the property over which she had a power of disposition by will. On the other hand, it is said that the *Statute of Limitations* applies by analogy to this debt, and that it cannot now be recovered by the husband. I think that Mr. Justice *Kay* rightly decided the question on that ground. I assume that there was a loan in 1875, although I do not decide that point, not having heard the counsel for the Respondent; but I assume that there was a loan, and that it was never repaid by Lady *Hastings*, and that there had been no acknowledgment of the debt or payment of interest before her death, which happened in 1884. Under these circumstances is the debt now barred by the *Statute of Limitations?*

In deciding this question we ought to consider what has been laid down by Courts of Equity as to the position of married women with respect to their separate estate. The case is not governed by the *Married Women's Property Act*, the contract having been made in 1875. Courts of Equity created the doctrine of the separate estate of married women, and allowed to married women a protection which could not be annexed to a man's estate, namely, a restraint on anticipation. When such a restraint is imposed a married woman is precluded from binding her separate estate, but where there is no restraint on anticipation the Courts of Equity have considered her to be in the same position as a *feme sole* with respect to her separate property; that is to say, they enable her to contract with reference to it as if she were a *feme sole*. And

(1) 15 Ch. D. 87.

they came to this conclusion—that not only by a special contract but by incurring a simple contract debt she could bind her separate estate. Not that the creditor could have a personal remedy against her, but he could bring an action, formerly in the Court of Chancery, and now in any Court, in which he might establish an obligation on her separate estate arising out of the contract, and then could obtain execution, not in the ordinary way, but by the Court directing an inquiry what separate estate she had at the time of the contract, and giving equitable relief against it, by handing it over to the creditor. That being so, why should not the *Statute of Limitations* apply to such a contract? The Courts have created an imaginary creature, namely, a married woman with the powers of a *feme sole*: and it is, in my opinion, properly and duly following the analogy of the *Statute of Limitations* to say that if the Court can allow her to contract in the same way as a *feme sole* the statute must run against her contracts as if she were a *feme sole* or any other person not incapacitated from entering into a contract. The analogy of the *Statute of Limitations* is, therefore, in my opinion, applicable to the assets and obligations of a married woman in respect of her separate estate.

Then it was said that in this case the *Statute of Limitations* could not run because the debt was contracted by a married woman with her husband, who could not bring an action against his own wife. It is true that there can be no judgment in an ordinary way against a married woman, but her trustees could be brought before the Court and an inquiry would be directed and her property reached in the hands of the trustees. Then it is said, that the husband in this case was himself the trustee of his wife's separate property, and that he could not bring an action against himself, and therefore could not get any remedy against the property of his wife during her life. But that view is wrong. It is true that he had the legal property in himself, but the mere fact that he was the trustee would not have precluded him from making a claim against the separate property, not as the trustee of the property, but as the creditor of his wife, and he would have been able to get an order of the Court under which he could have made the separate property available. Therefore there was

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no difficulty arising from the fact that there was no trustee except the husband. He might have brought an action at any time after 1875, when the loan was contracted.

Then it was contended that the lady disposed by her will of property which she could not dispose of during her life, and that her husband would have a right to enforce his right against that property. I assume that if there had been no question of the *Statute of Limitations* he might have made that property available for payment of his claim. But how does that get over the difficulty that the claim was at the death of the lady statute-barred? The will would not revive a debt which was statute-barred at the death of the testatrix. I can conceive no ground on which in a case like this a different rule should apply from that which applies in ordinary cases. The case which is most similar to this is *Hodgson* v. *Williamson* (1), before Vice-Chancellor *Bacon*, in which the Judge relied on the fact that the claimant had brought his action as soon as there was any fund out of which he could be paid; because the only property of the married woman was that which she got from her father, and that had only lately been realized. Mr. *Fischer* sought to make that argument applicable to the present case, and he relied on the fact that the property which passed under her will became liable to the claim within six years. But there was property settled to her separate use ever since 1875, which could have been made available. Therefore the ground relied on by Vice-Chancellor *Bacon* fails in the present case. I have some doubt whether the Vice-Chancellor was right in the reliance he placed on that ground, because the bar created by the *Statute of Limitations* is irrespective of the fact of the debtor having any property. Some other cases which have been cited are simply authorities upon the question whether the statute can be pleaded as a defence by a married woman.

Norton v. *Turvill* (2) is very shortly reported. The lady had a power to appoint by deed or will, and she gave a bond for £25. Of course no action could have been brought against her on that bond, but as I understand the judgment of the Master of the Rolls, he considered the execution of the bond as an exercise of her power of disposition. He says: "It is true, that the bond

(1) 15 Ch. D. 87. (2) 2 P. Wms. 144; 2 Eq. C. Ab. 152.

given by the *feme covert* is merely void, and in that respect differs from a bond given by an infant, which is only voidable. . . . But in this case, all the separate estate of the *feme covert* was a trust estate for payment of debts, and a trust is not within the *Statute of Limitations*." But is this true? As between the trustee and the *cestui que trust* the statute cannot be pleaded, but the Master of the Rolls must have thought in that case that the married woman had exercised her power of appointment and that the creditor was one of the persons for whom the trustee held the property. Then how has that authority been subsequently dealt with? In *Sockett* v. *Wray* (1) Lord *Alvanley* says: "In *Norton* v. *Turvill* (2), the disposing power was not confined to being exercised by a will. The question was, as to the execution by bond. The Master of the Rolls was of opinion, that though as a bond it was void, it was a good disposition against persons claiming under her will, and that where a person having a disposing power, gives a bond, it is binding on her personal property." The Master of the Rolls looked upon the bond, erroneously as I think, as an execution of the power which the settlement gave her and that the creditor became a *cestui que trust* under the settlement. That seems to be the explanation of his judgment. *Heatley* v. *Thomas* (3), in my opinion, does not help us in this case. It turns on quite a different point. Then in *Vaughan* v. *Walker* (4) the Lord Chancellor of *Ireland* held that the *Statute of Limitations* did not run against the creditor of a married woman: but Lord Justice *Blackburne* differed from that view. I must express my opinion that the Lord Chancellor was wrong in the view which he took, and that he did not deal with the liability of the separate estate of a married woman as we ought to deal with it. I decide this case on the principle that a married woman who makes a contract is to be dealt with as a *feme sole* with respect to her separate property, and that a claim under such contract can be enforced against the separate property which she had at the date of the contract. I am therefore of opinion that Mr. Justice *Kay* was right, and that the appeal must be dismissed.

(1) 4 Bro. C. C. 487.
(2) 2 P. Wms. 144; 2 Eq. C. Ab. 152.
(3) 15 Ves. 596.
(4) 8 Ir. Ch. Rep. 458.

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Lindley, L.J.:—

I am of the same opinion. With respect to the question whether the facts which have been proved in this case established an existing debt I have great doubts; but we have not heard the counsel for the Respondent, and I express no opinion upon it. But when we come to the more important question of the effect of the *Statute of Limitations*, I confess I have no doubt at all about it. The whole subject has been dealt with fully both by Lord Justice *Cotton* and Mr. Justice *Kay*, and Mr. Justice *Kay*, in his careful judgment, has correctly explained the passage in the report of *Norton* v. *Turvill* (1) on which the whole argument has turned. It appears to me that a married woman with separate estate can act as a *feme sole* with respect to it, and her debts are to be treated as payable out of her separate estate. I think Mr. Justice *Kay* was right in saying that *Norton* v. *Turvill* is to be explained by saying that the bond was held to have operated as an appointment making the trustee of the settlement a trustee for the obligee of the bond: but that view is now exploded. The judgment appealed from is perfectly correct.

Lopes, L.J., concurred.

Solicitors: *Flower & Nussey*, agents for *R. N. Heane, Newport, Shropshire; Steavenson & Couldwall; Torr, Janeways, Gribble, & Oddie.*

(1) 2 P. Wms. 144; 2 Eq. C. Ab. 152.

M. W.

KAY, J.
1887
Feb. 17, 21, 26.

In re CLARKE. COOMBE *v.* CARTER.

[1886 C. 3113.]

Mortgage—After-acquired Property—Uncertainty—Contract—Equitable Assignment.

An assignment in 1876 by way of mortgage of all the mortgagor's household goods and farming stock, and "also all moneys of or to which he then was, or might during that security become, entitled under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of any person," and also all real and personal property "of, in, or to which the mortgagor was, or during that security should become, beneficially seised, possessed, entitled or interested for any vested, contingent or possible estate or interest":—

Held, to include a share of a testator's residuary estate to which the mortgagor became entitled subsequently to the date of the mortgage.

Belding v. *Read* (1) distinguished.

BY an indenture dated the 18th of January, 1876, and made between *George Hart* (thereinafter called "the mortgagor") of the one part, and *Thomas Worraker*, secretary of the *South Essex Equitable Investment and Advance Company, Limited* (thereinafter called "the mortgagee") of the other part, in consideration of the sum of £800 paid by the mortgagee to the mortgagor, the mortgagor granted and assigned to the mortgagee "all the household goods and also all the live and dead farming stock, tenant's rights and interests of the mortgagor of, in, or upon any farm now held, or which during this security may be held, by the mortgagor; also all real and personal estate to which the mortgagor shall become entitled under the will of his father *George Hart*; also all moneys of or to which he now is, or may during this security become, entitled under any settlement, will, or other document, either in his own right, or as the devisee, legatee, or next of kin of his father, or any other person or persons; also the policy of assurance on the life of the mortgagor in the sum of £1000 and numbered 41,134 in the *Liverpool and London and Globe Insurance Company;* also all other the freehold

(1) 3 H. & C. 955.

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hereditaments, goods, chattels, effects, debts, securities, documents, vouchers, books of account, fixtures and personal property of, in, or to which the mortgagor is, or during this security shall become, beneficially seised, possessed, entitled, or interested for any vested, contingent, or possible estate or interest; with full right and title to enter and possess, and for that purpose to remove and break every obstruction to the free access and entry in and upon and over all messuages, lands, tenements, and premises wherein any such goods or effects now are or hereafter may be, or may reasonably be supposed to be (except the necessary wearing apparel of the mortgagor, and except that any leaseholds not herein specifically mentioned, and any interest of the mortgagor in any land or hereditaments which he now holds or may hold as tenant not herein specially mentioned are not and shall not be deemed or construed to be included in the assignment hereinbefore contained unless and until the mortgagee, or some solicitor, agent, executor, or administrator, of the mortgagee, by writing indorsed hereon or referring hereto, shall declare the same to be included herein; and immediately upon such writing being made the leaseholds or interest in lands as tenant to which such writing shall refer shall immediately thereupon, and the foregoing assignment shall at all times thereafter, be read and construed as if such leaseholds or interest in lands as tenant, as the case may be, had been specifically mentioned therein, any rule of law or equity to the contrary notwithstanding);" to hold unto and to the use of the mortgagee, his heirs, executors, administrators and assigns, by way of mortgage for securing the repayment to the mortgagee of the said sum of £800, and all further sums in which the mortgagor should thereafter be indebted to the mortgagee. And it was provided that "all effects in which the mortgagor shall during this security have any interest shall, as between the parties hereto and every person claiming under or in trust for them respectively, be deemed to be included in and to pass by the assignment hereinbefore contained, except only as hereinbefore expressed."

By an indenture dated the 15th of May, 1885, for the consideration therein mentioned, "all so many and such part or parts as are now subsisting, and have not been got in or disposed of, of

and in the personal property mentioned, described, or referred to in" the mortgage, and the full benefit of the mortgage, were assigned and transferred to *Charles Carter* and *William Joseph Carter*, their executors, administrators and assigns.

In April, 1881, *George Hart* filed a petition for liquidation, and one *Hilliard* was appointed trustee in the liquidation.

On the death, on the 13th of September, 1884, of *Thomas Clarke*, the testator in the action, *George Hart* became entitled, under his will dated in 1875, to one twenty-third share—amounting to a sum of £184—of his residuary estate.

The question, raised by an originating summons taken out by the sole acting trustee and executor of *Thomas Clarke's* will as Plaintiff, against *C. Carter* and *W. J. Carter*, the transferees of the mortgage, *Hilliard*, *Hart's* trustee in liquidation, and one of the residuary legatees under the will, as Defendants, was whether the £184 was comprised in the mortgage.

Yate Lee, for the Plaintiff.

Byrne, for the mortgagees:—

I submit that the money in question is included in the mortgage. It will be said that *Official Receiver* v. *Tailby* (1) is an authority against me; but here the mortgage should be construed according to the well-known rule of equity, as a contract to assign after-acquired property, so that as soon as the property by its coming into existence becomes sufficiently ascertained to fulfil the description of the contract, it is bound by the contract: *Holroyd* v. *Marshall* (2); *Collyer* v. *Isaacs* (3); *Bennett* v. *Cooper* (4); *Clements* v. *Matthews* (5). In the latter case, Lord Justice *Cotton* commented on and distinguished *Belding* v. *Read* (6), which was followed by Mr. Justice *Fry* in *In re Count D'Epineuil* (7).

Begg, for *Hart's* trustee in liquidation:—

I submit that the description in the assignment is too vague

(1) 18 Q. B. D. 25.
(2) 10 H. L. C. 191, 209.
(3) 19 Ch. D. 342, 351.
(4) 9 Beav. 252.
(5) 11 Q. B. D. 808, 817.
(6) 3 H. & C. 955.
(7) 20 Ch. D. 758.

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and undefined to include this property, and that this case is covered by *Official Receiver* v. *Tailby* (1) and *Belding* v. *Read* (2).

[KAY, J.:—Why is this more vague than the common form in a settlement of a covenant to settle after-acquired propety?]

Marriage settlements are treated as exceptions to the rule: *Yate Lee* on Bankruptcy (3); *Hardey* v. *Green* (4). I submit that the rule applicable to assignments of this kind is correctly laid down by Lord *Esher* in *Official Receiver* v. *Tailby* (5).

Byrne, in reply.

1887. Feb. 26. KAY, J. (after stating the facts, continued):—

The question is whether the share of residue to which *Hart*, the mortgagor, so became entitled is bound by the mortgage. The only ground upon which it has been argued that it is not so bound is that the assignment in the mortgage is void for uncertainty. No other objection to the mortgage has been suggested. Of course, such assignment, so far as it purports to dispose of property of which the mortgagor was not possessed at the time, is only a contract: *Holroyd* v. *Marshall* (6); but it is argued that it is a contract of which, on account of its vagueness, equity will not decree specific performance. The question how far a Court of Equity will go in enforcing such contracts, where the consideration has been given, is illustrated not only by the case of *Holroyd* v. *Marshall*, but by the analogous decisions on covenants in marriage settlements.

In *Lewis* v. *Madocks* (7) the intended husband, before marriage, gave a bond conditioned to be void in case he should well and sufficiently devise, convey or assure, by way of settlement, all and singular such goods, chattels, personal estate and effects that he should at any time during the joint lives of himself and his intended wife, be possessed of. Lord *Eldon* was pressed with the difficulty of performing such conditions; and he said (8), after referring to a previous case of *Randall* v. *Willis* (9), "It is very

(1) 18 Q. B. D. 25.
(2) 3 H. & C. 955.
(3) 3rd Ed. p. 355.
(4) 12 Beav. 182.
(5) 18 Q. B. D. 29.
(6) 10 H. L. C. 191.
(7) 8 Ves. 150; 17 Ves. 48.
(8) 8 Ves. 157.
(9) 5 Ves. 262.

strong for a Court of Equity to say, that, because it is difficult to execute the covenant in particular cases, that may occur, therefore it shall not be executed. The same objection was there taken: is it to attach upon every chair and table, &c.? That difficulty occurred equally in *Randall* v. *Willis* (1); but it was got over thus,—that if the Court finds a solid subject of personal property, they would attach it rather than render the covenant perfectly nugatory; though they did not know what to do with the argument shewing the absurdity of it." And he declared that the personal estate of which the husband was possessed during the coverture was liable to the bond.

The case came on again for further directions, and was argued by Sir *Samuel Romilly* against the bond. Lord *Eldon* construed the bond as not applying to income but only to capital: but he stated that he still considered the declaration that the personal estate of which the husband was possessed during the coverture was liable to the bond, to be right; and he held that three sums of £600, £300, and £200, which the husband had invested in purchase of real estate, were bound by the settlement.

In *Hardey* v. *Green* (2), by marriage articles it was agreed that all and singular the real and personal property then belonging to the intended wife, or in or to which she might thereafter become interested or entitled by any means whatsoever, should be settled, and that the settlement should contain a covenant on the part of the intended husband to settle all property to which he or the intended wife might become entitled. It was argued that the case was not one for specific performance: but Lord *Langdale* maintained the covenant, and directed performance of it as against the assignee of the husband, by conveyance of certain real property in *Ireland* to which the husband had become entitled since the marriage.

In *Fyfe* v. *Arbuthnot* (3) Lord *Cranworth* expressed his opinion that a covenant in a deed of family arrangement—that if the covenantor should at any time obtain or become entitled to any property exceeding in value "the sum of £——," he would assign the same upon trust—was a valid covenant notwithstand-

(1) 5 Ves. 262.
(2) 12 Beav. 182.
(3) 1 De G. & J. 406.

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ing the blank, and would include any capital sum to which the covenantor might become entitled.

So thoroughly has the doctrine laid down by those authorities become established, that in the common forms for settlements the covenant to settle after-acquired property of the wife is in these words, as given in Mr. *Davidson's* Common Forms: "If the said wife now is, or if at any time or times during the said intended coverture she or the said husband in her right shall become entitled by descent, transmission, devise, bequest, gift, representation, purchase, or otherwise, to any real or personal property of the value of £—— or upwards, for any estate or interest whatsoever, except jewels, &c." it shall be settled.

The principle of these decisions is that, where the consideration has been given, Courts of Equity will give effect to the agreement if it be in any way possible, and will not yield to the dishonest plea on the part of the covenantor that the covenant is too vague for specific performance, unless it is impossible to ascertain its meaning or to give it any reasonable effect.

How can a covenant which in a marriage settlement is not too vague to be enforced, become too vague when it is contained in a deed of mortgage?

In *Bennett* v. *Cooper* (1) Lord *Langdale* held that a power of attorney, given by way of mortgage, to receive all sums of money then or thereafter to become due to the mortgagor, and all legacies or bequests which had already or might thereafter be given or bequeathed to him or his wife by any person whomsoever, amounted to an agreement to assign the sums which the attorney was empowered to receive; and he directed an account of such sums as had been received by the defendant, it being suggested that after the date of the deed-poll certain legacies had been given to and received by the mortgagor.

A similar effect has been given to debentures of joint stock companies, as in *In re Panama, New Zealand, and Australian Royal Mail Company* (2) and other cases, some of which are mentioned in Mr. *Yate Lee's* work on Bankruptcy (3).

(1) 9 Beav. 252. (2) Law Rep. 5 Ch. 318.
(3) 3rd Ed. p. 355.

Other like cases are referred to in the arguments in *Holroyd* v. *Marshall* (1).

On the other hand, there are certain at cases common law or in the Queen's Bench Division which, it is suggested, are inconsistent with these decisions. The first of these is *Belding* v. *Read* (2), where the mortgage was of all personal effects then being or thereafter to be upon or about the mortgagor's dwelling-house and farm at *Reedham* or elsewhere in *Great Britain*; and it was held, either that the words "hereafter to be" were a mere nullity, or that they gave an executory right as to which there could be no specific performance. I must observe that no case shewing how far a Court of Equity would go in enforcing specific performance was cited. Reliance was there placed on the language of Lord Chancellor *Westbury* in *Holroyd* v. *Marshall*, which merely intimated that an assignment of future personalty was only a contract, and that in order to be effective it must be such a contract as equity would specifically enforce. The Lord Chancellor did not attempt to define what contracts would come within that rule further than by this passage (3):—"A contract for the sale of goods, as, for example, of 500 chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell 500 chests of the particular kind of tea which is now in my warehouse in *Gloucester*, is a contract relating to specific property, and which would be specifically performed." In the same speech the Lord Chancellor said that "if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance." And in that case a contract that all

(1) 10 H. L. C. 191. (2) 3 H. & C. 955.
(3) 10 H. L. C. 209, 211.

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machinery, implements, and things which during the continuance of the security should be placed in a certain mill should be subject to the security, was held to be binding, and that immediately on new machinery and effects being fixed or placed in the mill they became subject to the operation of the contract and passed in equity to the mortgagees.

The decision in *Belding* v. *Read* (1) has been followed in other cases, among which are *In re Count D'Epineuil* (2) and *Official Receiver* v. *Tailby* (3). None of these cases is exactly in point. The agreement in the present case is plainly divisible. As to that part of it which relates to property derived under any will, the authorities I have cited in equity are quite conclusive, and I must follow that which has been the course of decision in the Court of Chancery since the time of Lord *Eldon*—which was recognised by Lord *Westbury* in the words I have quoted from his speech in *Holroyd* v. *Marshall* (4), and in the equity of which every one must agree—by declaring that the property in question in this case was bound by the mortgage.

The Plaintiff will have his costs out of the fund: I make no other order as to costs.

Solicitors: *Storey & Cowland*, agent for *Crick & Freeman, Maldon, Essex; Paterson, Snow & Co.*, agent for *F. T. Veley, Chelmsford; Duffield & Bruty.*

(1) 3 H. & C. 955.
(2) 20 Ch. D. 758.
(3) 18 Q. B. D. 25.
(4) 10 H. L. C. 209, 211.

G. I. F. C.

COOTE *v.* INGRAM.

CHITTY, J.

1887

March 11, 12, 15.

[1886 C. 4601.]

Practice—Trial with a Jury—Discretionary or of Right—Onus—Rules of Supreme Court, 1883, *Order* XXXVI., *rr.* 2–8.

In an action for injunction to restrain infringement of copyright and for damages:—

Held, that the Defendant had no right to a trial by jury, but that under Order XXXVI., rules 4 and 7 (*a*) the Court had a discretion which it exercised by directing a trial without a jury.

Semble, that the burden of proof was on the party applying for a jury.

MOTION on behalf of the Plaintiff to discharge an order made on the application of the Defendant in Chambers directing that the action should be heard by a jury.

The writ was indorsed with a claim for damages for the infringement of the Plaintiff's copyright in the words of certain songs, and delivery up of copies of the Plaintiff's copyright words in the Defendant's possession. An injunction to restrain the Defendant from unlawfully printing, publishing, or selling the Plaintiff's copyright words, or otherwise infringing the Plaintiff's copyright, was also claimed by the writ.

The statement of defence not admitting that the Plaintiff's copyright had been duly registered, raised the case that the Defendant had published and sold the works in question (songs) under a license from the Plaintiff's predecessors in title, and that such publication took place before the registration by the Plaintiffs of their alleged copyright in the songs. Since the institution of this action the Defendant had not published or sold any of the songs in question in this action. The defence of knowledge and acquiescence was also raised.

The Plaintiff had moved for an interim injunction, and the Defendant had given an undertaking.

On application by the Defendant in Chambers, an order was on the 17th of February made by Mr. Justice *Chitty*, who considered that he had no jurisdiction in the matter, and that the Defendant

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was entitled to a jury as of right, for trial of the action with a jury.

The Plaintiff now moved to discharge this order.

Romer, Q.C., and *Eyre*, for the Plaintiff:—

The action being to restrain an infringement of copyright, and as such properly brought in the Chancery Division, is one which, previously to the passing of the principal Act, could without any consent of parties have been tried without a jury (Order XXXVI., rule 4), and therefore does not fall under rule 6, which in cases not within rule 4 gives either party a right to a trial with jury. There being, therefore, no absolute right to a jury, the case falls within Order XXXVI., rules 4, 7 (*a*). The burden of proof lies on the applicant to shew why he should have a jury, and the Judge has a discretionary power only to allow that mode of trial: *The Temple Bar* (1). We submit that no case is shewn for the exercise of such discretionary power.

They also referred to *South Wales Mineral Railway Company* v. *Davis* (*Stirling*, J., Feb. 24, 1887 (2)).

Bramwell Davis, for the Defendant:—

The case is quite different from, and is not governed by, *The Temple Bar*, which does not, I submit, lay down any general rule as to the meaning of rule 4 such as shall be applicable to all cases, but only deals with the particular case which, being an Admiralty action *in rem*, could not before the passing of the principal Act have been tried with a jury except by consent, but would have been tried in the Admiralty Court without a jury, and therefore fell within the concluding words of rule 4. This is really an action for damages in respect of an infringement of copyright, and might have been brought either at Common Law or in the Chancery Division; and being an action as to which there is concurrent jurisdiction, the fact that it was brought in this Division, and that in addition to damages an injunction was claimed, cannot prejudice the right to a jury: *Coles* v. *Civil Service Supply Association* (3). If brought at Common Law, as it might

(1) 11 P. D. 6.

(2) Unreported.

(3) 32 W. R. 407.

have been, it would have been tried with a jury as a matter of course and without any consent, and therefore does not fall within the last words of rule 4, "which previously to the passing of the principal Act could, without any consent of parties, have been tried without a jury." It is therefore governed by rule 6, which "in any other cause or matter," *i.e.* in all cases not within rules 3, 4, or 5, gives either party the right, which is not to be disputed, to have the action tried with a jury: *Old Mill Company* v. *Dukinfield Local Board* (1). Under the similarly worded rules of 1875 (Order XXXVI., rules 3, 26) it was held by the Court of Appeal that the *onus* was on the party who desired that the action should not be tried before a jury: *In re Martin* (2). The result of discharging the order will be that, in every action in respect of which there is concurrent jurisdiction, this *primâ facie* right to a jury will be taken away. But if this case is not within rule 6, but is governed by the decision in *The Temple Bar* (3), it is, I submit, a case for the exercise of the discretion to "order any cause, matter, or issue to be tried by a judge with a jury" given by rule 7 (*a*).

Romer, in reply.

Fennessy v. *Rabbits & Sons* (*Kay*, J.) (4) was also referred to.

CHITTY, J.:—

The Defendant claims a trial of this action with a jury, first, as a matter of right, and secondly, as a matter of discretion. The Plaintiff contends that the action ought to be tried without a jury. The treatment of causes in the High Court is now regulated by rules 2–8 of Order XXXVI., which, read together, form a code on the subject. The questions which I have to decide turn principally on the meaning and effect of rules 4, 6, and 7 (*a*) of that Order. The interpretation of these rules has recently been dealt with by the Court of Appeal in the case of *The Temple Bar*, and their decision, I need scarcely add, is binding upon me. The general effect of the above-mentioned rules in Order XXXVI.

(1) 51 L. T. (N.S.) 414.
(2) 20 Ch. D. 365.
(3) 11 P. D. 6.
(4) 31 Sol. J. 316.

CHITTY, J. 1887 COOTE v. INGRAM.

is, as I understand the judgments of the Court of Appeal, and particularly that of Lord Justice *Lindley*, to preserve to the suitor the right to a jury in those cases where the right existed previously to the passing of the principal Act, viz. the *Supreme Court of Judicature Act*, 1873 (see Order LXXI., rule 1), and to confer a discretion on the Court or a judge in cases where the right to a jury did not previously exist.

Rule 7 (*a*) provides that the trial shall be by a judge without a jury, except in the cases specially excepted. The exceptions are, first, where a trial with a jury is ordered under the provisions of rule 6; and secondly, where, under rule 2, either party has signified a desire to have a trial with a jury. Rule 2 relates to actions of slander and other specified actions of a nature obviously fit to be tried with a jury. For the purpose of my decision, rule 2 and the proviso in rule 7 (*a*) may be laid aside. Rule 7 (*a*), then, provides, as the normal mode of trial, a trial by a judge without a jury. It is proper, for the purpose of my decision, to ascertain the scope of rule 6, which constitutes an exception to the general provisions of rule 7 (*a*).

Rule 6 provides that "in any other cause or matter" upon the application of any party for a trial with a jury of the cause or matter, or any issue of fact, an order shall be made for a trial with a jury. Now the Court of Appeal decided in *The Temple Bar* (1) that the words, "in any other cause or matter," in rule 6, referred to and included the causes and matters specified in rule 4. This is clear from a perusal of the judgments delivered. It forms a principle upon which the judgments are based. The Court read the words, "which previously to the passing of the principal Act could, without any consent have been tried without a jury," in rule 4, as relating to the cause or matter, and not as relating to "any question or issue of fact or partly of fact or law arising in" any such cause or matter.

The case before the Court of Appeal was that of an Admiralty action which, before the passing of the principal Act, could without any consent of parties, have been tried without a jury, and they held that there was no right to a jury. The case before me is one which could, previously to the passing of the principal Act, have

(1) 11 P. D. 6.

been tried in the Court of Chancery under its enlarged jurisdiction, as it then existed, by a judge alone, without any consent of parties. Consequently I hold the Defendant cannot demand a jury as of right.

There arises, then, the question of discretion. The action is brought principally to obtain an injunction for the infringement of copyright in the words of certain songs, and incidentally for damages. The defence denies the copyright and the due registration of the copyright, and raises an objection to the registration: it also alleges a licence, and (as explained at the bar) sets up a case of acquiescence. The Plaintiff moved for an injunction and obtained an undertaking. I have a strong impression, from what took place on the motion, that there is no real defence. But, however this may be, I think that, having regard to the nature of the case as shewn in the pleadings, the action is one which can be more conveniently and better tried without a jury: the questions, such as they are, are rather questions of law than issues of fact. In the exercise of my judicial discretion I come to this conclusion, whether the burden of shewing that the action ought to be tried without a jury rests upon the Plaintiff or upon the Defendant. Rule 4 is a reproduction in identical words of rule 26 of Order XXXVI. of the Rules of Court previously existing. On the construction of the old rule 26, it was held by the Court of Appeal in *In re Martin* (1) that the burden of proof lay on the party applying for a trial without a jury. But, as was stated in *The Temple Bar* (2) by Lord Justice *Cotton*, *In re Martin* was decided on rules different from those now in force, and under which the rights of parties were different, so that it could have no bearing on a case such as that before him, viz. a case where there would have been no right to a jury when the principal Act was passed. He explains the existence of rule 4 in the present rules of Court by saying that it seemed to him that it had reference to matters comprised in rule 7, and that it may have been inserted to enable a judge to order a trial by jury in cases in which perhaps but for it there might have been some doubt whether he had the power to make the order. According to the precise language of rule 4, it empowers the Court or a judge to

(1) 20 Ch. D. 365. (2) 11 P. D. 6.

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direct a trial without a jury, not with a jury. But unless there is some slip in the report, I understand the Lord Justice to mean that there is a discretion under rule 4, or under rules 4 and 7 (*a*), read together, to direct a trial, either with or without a jury, in cases where there was no right to a jury at the passing of the principal Act. The Master of the Rolls in his judgment treats *The Temple Bar* case (1) as falling within rule 7 (*a*), and as being, therefore, a matter within the discretion of the judge, and he says that the burden of proof lay on the applicant to shew why he should have a jury. Lord Justice *Lindley* also treats this case as falling within rule 7 (*a*), which allows, as he says, a judge in his discretion to direct that a party may have a jury in cases in which parties had previously no such right.

From the judgments read as a whole I gather that the Court of Appeal construe the new rules as throwing the burden of proof on the party who asks for a jury, or at all events that the discretion of the judge when it exists is unfettered.

But, however this may be, I hold that this action ought not to be tried with a jury.

The order in Chambers, which did not proceed on the exercise of any discretion, will be discharged, and the costs will be costs in the action.

Solicitors: *Wilkinson & Howlett; G. J. T. Barrett.*

(1) 11 P. D. 6.

F. G. A. W.

BURROWS *v.* HOLLEY.

CHITTY, J.

1887

March 29, 31.

[1884 B. 5452.]

Middlesex Registry — Registration of Final Order of Foreclosure — Middlesex Registry Act (7 *Anne*, c. 20), *s.* 18 [*Revised Ed. Statutes, vol. ii., p.* 205]— 1 *&* 2 *Vict. c.* 110 [*Revised Ed. Statutes, vol. viii. p.* 369]—*Jurisdiction.*

An order for foreclosure absolute in respect of lands in *Middlesex* is not a judgment within the meaning of 7 Anne, c. 20, s. 18, and 1 & 2 Vict. c. 110, so as to require a memorial to be entered at the *Middlesex* Registry Office; and a direction to the Registrar of Deeds to that effect was refused.

In this case default having been made by the mortgagor in payment of the amount certified to be due upon the mortgage (of lands in *Middlesex*), a final order of foreclosure was moved for by the Plaintiff, the mortgagee, and also a direction to the *Middlesex* Registrar that a memorial of the final order and of the order *nisi* be registered at the *Middlesex* Registry.

The Registrar had refused to enter the memorial without a direction from the Judge.

Boome, for the Plaintiff, in support of the application.

Chitty, J.:—

I doubt whether I have any jurisdiction to insert in the order the proposed direction. I must be satisfied that the Registrar would act on such a direction if given.

March 31. The following note from the Registrar was now produced:—

"If the Judge will make the order for registration of the foreclosure decrees in this case we shall most certainly act upon it—in fact, there is no other means that I know of for registering them at all. Such orders have been made and acted upon. The suggested words (*i.e.*, words directing that a memorial of the orders should be registered) are sufficient."

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Boome, in support of the application :—

By the *Middlesex Registry Act* (7 Anne, c. 20), s. 18, no judgment shall affect or bind any lands, &c., in *Middlesex*, "but only from the time that a memorial of such judgment shall be entered at the said register office," &c. By sect. 18 of 1 & 2 Vict. c. 110, which is to be read together with the *Registry Acts*, all "decrees and orders of Courts of Equity shall have the effect of judgments in the superior Courts of Common Law." The *Judicature Act*, 1873, s. 100, also provides that "judgment" shall include "decree." I submit, therefore, that a final order for foreclosure is within the purview of the *Registry Act*, and that there is jurisdiction in the Court to give the direction required. In *Gibbs* v. *Sidney* (1) Mr. Justice *North* made a declaration that the registration of a deed, which had been ordered to be set aside, ought to be vacated.

CHITTY, J. :—

In this case I am asked to insert in a foreclosure order a direction to the Registrar that the orders shall be registered at the *Middlesex* Registry. I cannot think that I ought to make such a direction, unless of opinion that the registration ought to take place. The only ground alleged is sect. 18 of the *Middlesex Registry Act* (7 Anne, c. 20); but on reading that section it is clear that the "judgment" there mentioned is a Common Law judgment for money, and I need hardly say that an order absolute for foreclosure is not a money judgment or anything like it. Then it is said that since 1 & 2 Vict. c. 110, decrees of a Court of Equity ought to be treated as judgments. But that Act (sect. 18) speaks of "decrees and orders of Courts of Equity whereby any sum of money, or any costs, charges, or expenses shall be payable," and clearly refers not to decrees and orders generally, but to decrees and orders for the payment of money. I was also referred to sect. 100 (the interpretation clause) of the *Judicature Act*, 1873, which says that the word "judgment" shall include decree. That is, however, not a general definition, but a definition for the purposes of the *Judicature Acts* only.

(1) 49 L. T. (N.S.) 132.

For more than a century and a half foreclosure decrees have been made and acted upon without it being thought necessary to register them; and I should only be throwing doubt on many existing titles if I were now to give the direction which is asked for, and I decline to do so.

It is true that the Registrar has said that he will act on any direction that I make, and that directions similar to that now asked for have been made, but that is not sufficient; I must see that I am justified in making this direction. No sufficient ground, in fact no ground at all, has been shewn for the application, which I must, therefore, refuse.

Solicitors: *Barnard & Co.*

F. G. A. W.

YORKSHIRE BANKING COMPANY *v.* MULLAN.

[1885 Y. 31.]

Receiver—Mortgagor and Mortgagee—Mortgagor in Possession—Occupation Rent.

In a foreclosure action against mortgagor in possession, an order having been made for the appointment of a receiver and for the tenants to attorn and pay their rents in arrear and growing rents to such receiver:—

Held, that the possession of the mortgagor being rightful, he was liable to pay an occupation rent from the date of demand by the receiver only, and not from the date of the order appointing the receiver.

MOTION.

Plaintiffs, who were equitable mortgagees from the Defendant, brought an action against him in 1885 for an account, sale or foreclosure of the mortgaged property, and for a receiver. On the 25th of June, 1885, an order was made for the appointment of a receiver and that the tenants should attorn and pay the rents in arrear and growing rents to him. On the 18th of July the Plaintiffs obtained a foreclosure judgment *nisi*, and on the 7th of May the Chief Clerk made his certificate whereby a large sum was certified to be due to the Plaintiffs. The Defendant, the mortgagor, continued in possession or occupation of part of the lands comprised in the Plaintiffs' security, but no occupation rent

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had been fixed or paid. On the 31st of January, 1887, application was made by the receiver to the Defendant for payment of rent as from the 25th June, 1885 (the date of the appointment of the receiver), to the 25th December, 1886, in respect of the lands in Defendant's occupation. The Defendant declining to pay rent except as from the date of the demand, the Plaintiffs now moved for a declaration that an occupation rent was due from the Defendant as from the 25th of June, 1885, for an inquiry as to the amount, and for an order for payment by Defendant of the amount when certified, or, in default, for delivery up of possession to the receiver.

Methold, in support of the motion, submitted that an occupation rent was due from the Defendant from the date of the order appointing the receiver. He referred to *Reid* v. *Middleton* (1); *Lloyd* v. *Mason* (2); *Randfield* v. *Randfield* (3).

Grosvenor Woods, for the Defendant, *contrà* :—

An occupation rent is payable from the date of the demand only, and not from the time when the receiver was appointed. Until the ownership of the land is vested in the mortgagee by the effect of an order of foreclosure absolute the possession of the mortgaged land by the mortgagor is rightful, and not by wrong, and he is entitled to the rents and profits: *Heath* v. *Pugh* (4). This relation between mortgagor and mortgagee is not affected by the mere appointment of a receiver; and until a formal demand for rent is made, the mortgagor in possession is not accountable to him for the occupation of the land.

CHITTY, J.:—

The order in this case which appoints the receiver is in simple form, and, whilst directing the tenants to attorn and pay their rents to the receiver, does not in any way take cognizance of or provide for the circumstance that the mortgagor was himself in possession and occupation of part of the lands comprised in the mortgage security. The law on the subject is clear. The posses-

(1) T. & R. 455.
(2) 2 My. & Cr. 487.
(3) 7 W. R. 651.
(4) 6 Q. B. D. 345; 7 App. Cas. 235.

sion of the mortgagor is a lawful possession, and he is entitled to remain in possession until ordered to deliver up possession or possession has been demanded by or on behalf of the mortgagee; and it is also clear that a mortgagee cannot obtain an account of back rents due from the mortgagor in respect of his possession. Effect has been given to the rights of a mortgagor in possession by the *Judicature Act*, 1873, sect. 25, sub-sect. 5, which gives to a mortgagor the *primâ facie* right to sue for possession or for recovery of the rents and profits, thereby shewing on the part of the Legislature a strong recognition of the position in which the mortgagor stands to the mortgagee. The receivership order here contains no direction that the mortgagor should himself attorn tenant, nor does it say that he must deliver up possession. I therefore hold that the mortgagor is rightfully in possession. In *Randfield* v. *Randfield* (1), under similar circumstances, Vice-Chancellor *Kindersley* held that the possession of the widow of the testator was rightful as against the receiver appointed under an order similar to that in this case, and that the plaintiff was right in not delivering up possession unless expressly ordered to do so. The Vice-Chancellor afterwards made an order giving the plaintiff the option either to deliver up possession or to retain occupation at an occupation rent. So here I consider the mortgagor was not tenant within the meaning of the receivership order. I consider, therefore, that he was lawfully in possession in the widest sense of the term: that is to say, he had all the legal and equitable rights of a tenant in possession. The earliest date which I should be justified in fixing as that of the commencement of the rent would be that of the demand of the receiver, viz., the 31st of January, 1887; and there will be the usual inquiry for the purpose of ascertaining the amount payable, and, in default of payment, an order for delivery up of possession.

Costs will be costs in the action.

Solicitors: *Emmett, Son, & Stubbs*, agents for *Leeman, Wilkinson, & Badger, York; A. R. Oldman.*

(1) 7 W. R. 651.

F. G. A. W.

NORTH, J.

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March 5, 12, 14.

WILLIAMSON *v.* FARWELL.

Power of Appointment—Excessive Exercise—Attempted Delegation—Validity of Appointment in Default of Exercise of delegated Power.

The donee of a power of appointment among his own children appointed to his son for life, with remainder to the son's children as he should appoint, and, in default of such appointment, to the son absolutely. The son died without having attempted to exercise the power thus delegated to him :—

Held, that the ultimate limitation in favour of the son was valid and took effect.

Observations of Lord *St. Leonards* (1) commented on and explained.

THIS was a petition in a suit commenced in the Court of Chancery in 1846, the question for determination being whether a power of appointment had been validly exercised.

By a post-nuptial settlement, dated the 25th of May, 1816, certain real and personal estate was vested in a trustee, upon trust to pay the rents and annual produce thereof to *Richard Lane* and his assigns for his life; and after his decease in trust for all and every or such one or more exclusively of the other or others of the child or children of *Richard Lane* by *Sarah Louisa* his wife, then born or to be born in his lifetime, or in due time after his death, or of the issue of any of the same child or children who should depart this life in the lifetime of *Richard Lane* leaving issue then living, at such age or respective ages, and, if more than one, in such shares and proportions, as *Richard Lane* by deed or will should direct and appoint; and, for want of such direction or appointment, in trust for all and every the children and child of *Richard Lane* by *Sarah Louisa* his wife, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry under that age.

Richard Lane, by his will, dated the 22nd of August, 1828, after stating that he was desirous of exercising the power of appointment contained in the settlement, directed and appointed that the trustees thereof should stand possessed of the rents, issues, and profits of the premises in the settlement mentioned, upon trust to pay the same unto, between, and amongst his four

(1) *Sugden* on Powers, 8th ed. p. 515.

daughters, *Ellen*, *Louisa*, *Catherine*, and *Fanny*, in equal shares as tenants in common for their respective lives, and, after the decease of any or either of his four daughters leaving lawful issue, upon trust for such issue in such shares and proportions as such daughter or daughters so dying and leaving issue as aforesaid should by deed or will direct or appoint; and, for want of such appointment, in trust for such issue respectively, their heirs, executors, administrators, and assigns, for ever. But, in case of the death of any or either of his said daughters without issue, or such issue should not live to attain twenty-one, then that the share or shares of her or them so dying as aforesaid should go and be paid to the survivor or survivors of his said daughters for the term of their respective lives, in equal shares as tenants in common, and, if only one such daughter, then to such daughter for her life; and, after the death of the survivor of his said four daughters or such of them as should die without issue as aforesaid, upon trust to pay as well the accruing as the original shares of such daughters to his son *R. K. Lane* for his life, and after his decease in trust for the child and children of *R. K. Lane* as he should by deed or will appoint; and, in default of such appointment, to the use of *R. K. Lane*, his heirs, executors, administrators, and assigns.

Richard Lane died in 1838. He had by his wife *Sarah Louisa* six children, all of whom attained twenty-one, and were living at the date of the settlement, they being the five children named in his will, and a son *Charles*, who died in 1823 intestate and without having been married. The daughters *Louisa*, *Catherine*, and *Fanny* respectively married; the daughter *Ellen* did not.

Ellen died in June, 1845, having made a will. *R. K. Lane* was in June, 1855, adjudicated a bankrupt, and obtained his certificate in June, 1857. He died on the 26th of March, 1862, having by his will, dated the 12th of May, 1860, given all his property to his son *G. L. Lane*. He did not attempt to exercise the power of appointment given to him by the will of his father *Richard Lane*. *Richard Lane's* daughters *Louisa* and *Fanny* both died without issue, the latter in September, 1885. The daughter *Catherine* married a Mr. *Williamson*, and she died in December, 1862, leaving issue.

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The suit was commenced in May, 1846, by Mrs. *Williamson*, against the then trustees of the settlement and other persons, for an account of the trust estate received by the trustees, and for other relief.

This petition was presented by some of the children of Mrs. *Williamson*, to obtain the decision of the Court as to the persons entitled to the trust estate. Among the claimants was the assignee in the bankruptcy of *R. K. Lane*.

Giffard, Q.C., and *Follett*, for the Petitioners:—

As to the share of the daughter *Catherine*, at any rate, the limitation to her issue, who were not objects of the original power, is invalid, and the subsequent limitation over, though to objects of the power, is also invalid: *Alexander* v. *Alexander* (1). On the same principle the ultimate limitation to *R. K. Lane*, though he is an object of the power, must also fail, because it is in default of any exercise of the power which the testator attempted to delegate to him to appoint among his own children, who were not objects of the original power. It is clearly settled that, if the donee of a power purports to exercise it by appointing to persons who are not objects of it, and subject to that limitation appoints to an object of the power, though the first limitation is void, the subsequent limitation cannot take effect, because the intention of the donee was that it should not take effect until the prior limitation should be exhausted: *Sugden* on Powers (2); *Alexander* v. *Alexander*; *Robinson* v. *Hardcastle* (3); *Reid* v. *Reid* (4); *Brudenell* v. *Elwes* (5). Of course the attempt to delegate a power must fail, and no doubt in *Ingram* v. *Ingram* (6) it was held that an appointment in favour of the objects of the power, following a delegation of the original power, and in default of any exercise of that power, could take effect. But in that case the delegated power was to appoint to persons who were objects of the original power. That makes all the difference, and this was clearly the opinion of Lord *St. Leonards*: *Sugden* on Powers (7). In his opinion a gift over in default of the exercise of a dele-

(1) 2 Ves. Sen. 640.
(2) 8th Ed. pp. 508–511.
(3) 2 T. R. 241.
(4) 25 Beav. 469.
(5) 1 East, 442.
(6) 2 Atk. 88.
(7) 8th Ed. p. 515.

gated power to appoint to strangers is just as bad as a gift over after an appointment by the donee of the original power himself to strangers, the reason being that in either case he equally contemplates the interposition of strangers as objects of the bounty of the original donee; whereas, when he attempts to delegate a power to appoint to objects of the original power, he has nothing of the kind in his contemplation. In that case he contemplates and intends that the property shall go to objects of the power, though he attempts to delegate the power of distribution among those objects. In such a case there is only a defect in machinery; in the other there is a defect in substance. Equity will in favour of the objects of a power aid the defective exercise of it; it will not do so in favour of strangers.

Webb v. *Sadler* (1) may be cited against us, but there the delegated power was given only in name, not in substance and in fact. It was to be exercised only with the consent of the trustees of the donee's will. The mere existence of such a nullity could not defeat a gift over to objects of the original power.

Humber, for persons in the same interest.

Cookson, Q.C., and *Kingdon*, for the assignee in the bankruptcy of *R. K. Lane*:—

The ultimate limitation to *R. K. Lane* absolutely is good and can take effect as to the shares of the daughters who have died without leaving issue, for that is the proper construction of the words "without issue" in the gift over in the will: *Thicknesse* v. *Liege* (2).

[NORTH, J.:—I think that case applies.]

If the distinction suggested by Lord *St. Leonards* is well founded, the contingency which he contemplated has not happened. *R. K. Lane* did not attempt to exercise the delegated power. But the distinction cannot be maintained. *Ingram* v. *Ingram* (3) applies. The principle of the decisions, that an appointment in remainder after an appointment to strangers to the power is void, is, that it is the intention of the donee that the

(1) Law Rep. 8 Ch. 419. (2) 3 Bro. P. C. 365.
(3) 2 Atk. 88.

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ultimate limitation shall not take effect unless the gift to the strangers fails, *i.e.*, fails by failure of those persons, not by reason of its being a void gift. In the present case the intention of the donee was that the ultimate gift should take effect in default of any appointment under the delegated power, and there has been that default. There is no sound distinction between the case of an ultimate gift to some of the objects of the power and an ultimate gift to all the objects. The vice was in the delegation of the power, and, the delegated power being swept away, there is no reason why the ultimate limitation to an object of the power should not take effect: *Crozier* v. *Crozier* (1); *Crompe* v. *Barrow* (2); *Webb* v. *Sadler* (3); *Carr* v. *Atkinson* (4); *In re Warren's Trusts* (5).

Giffard, in reply:—

The validity of the ultimate gift cannot depend upon whether the donee of the delegated power did or did not attempt to exercise it. That would be contrary both to principle and to the meaning of what is said by Lord *St. Leonards*. What he means to say is, that the principle of *Ingram* v. *Ingram* (6) applies only where the delegated power is to appoint to objects of the original power. But here the intention of the testator was, that persons not objects of the original power should take, though the shares in which they were to take was to be determined by *R. K. Lane*.

NORTH, J. (after stating the provisions of the settlement of 1816, and the appointment made by the will of *Richard Lane* in favour of his daughters and their issue, continued):—

The appointment in favour of the daughters is good, but the appointment in favour of their issue is not. Then there are limitations over of the income in case of the death of any of the daughters without issue, or in case such issue should not live to attain twenty-one. The word "issue" there clearly refers to issue to whom a gift has been already made, *i.e.*, issue living at the

(1) 3 D. & War. 353.
(2) 4 Ves. 681.
(3) Law Rep. 8 Ch. 419.
(4) Law Rep. 14 Eq. 397.
(5) 26 Ch. D. 208.
(6) 2 Atk. 88.

deaths of the daughters respectively. Then the testator goes on to direct that after the death of the survivor of the daughters, or such of them as should die without issue as aforesaid (that again must mean without issue who take under the previous limitations, an event which happened in the case of three of the daughters) the property is to be held on trust to pay the income to his son *R. K. Lane* for his life. That limitation is perfectly good under the power. But the testator goes on to direct that after the death of the son the property is to be in trust for his children as he shall by deed or will appoint, and in default of such appointment to the use of the son absolutely. That attempt to delegate to the son a power to appoint to his children was in excess of the power given to the testator by the settlement, and therefore it is bad. But the appointment to the son himself is perfectly good, unless it is made bad by reason of the introduction of the delegated power to the son. In my opinion the ultimate limitation to the son is good, and I think this is perfectly clear upon the authorities.

I will first refer to *Crompe* v. *Barrow* (1), in which there was an invalid appointment, not a delegation of the power. In that case, by a settlement made upon the second marriage of a widow, a power was given to her to appoint the settled property by will among her children by her former husband and her children by her then intended husband. At the time of her second marriage she had six children living by her first husband, but only two of them, *Charles Barrow* and *Frances James*, the wife of *Robert James*, were living when she made her will in February, 1796. She had no children by her second marriage, and she died in June, 1798. By her will she directed that a moiety of the settled property should be held in trust for her daughter *Frances James*, and that the other moiety should be held in trust to permit the income to be received by her son *Charles* for his life, and after his death upon trust for such wife and children or child of the said *Charles Barrow* as he might leave behind him, in such shares as he should by deed or will appoint, and for want of such appointment in trust to assign, transfer, and pay the same unto such wife and children, equally, if more than one; and, if but one of them

(1) 4 Ves. 681.

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should be then living, then to assign the whole to such only one; but, in case the said *Charles Barrow* should die without leaving a wife or child him surviving, then, after his decease, in trust to assign the same unto the daughter absolutely. The wife and children of the son were clearly outside the power, and the Master of the Rolls decided that "as to so much of the property as is not distributed among the objects of the power it is to be considered as unappointed." The question was then raised whether the ultimate limitation to the daughter depended upon the preceding estates given to the wife and children of *Charles* and must fall with them, and it was said that the will must receive its general construction from the death of the testatrix. The Master of the Rolls said (1): "I do construe the will at the death of testatrix, and I think the ultimate appointment is good. If there is no wife or child of *Charles Barrow*, the manner, in which she has affected to execute the power, never takes effect at all. I have determined in *Routledge* v. *Dorril* (2), according to *Robinson* v. *Hardcastle* (3), that if you give for life to a child, who is an object of the power, and then to the children of that child, and, in failure of issue, to a person who is an object of the power, that is void: but the distinction of this case from that is, that this limitation over to *Frances James* is, if *Charles Barrow* should die without leaving a wife or child surviving. It fails, as far as it affects to give interests to the children; but is there any occasion to make it fail upon the other point, the gift over to a person, who is an object of the power? Why am I to exclude the person taking over, who has a right to take? There are two alternatives: if *Charles Barrow* leaves no wife or children at his death, then the limitation over being to a good object shall take effect: if he does leave a wife or children, then it cannot take effect." There are several other cases to the same effect, but I only wish to refer to one of them, *Long* v. *Ovenden* (4). In that case, by a settlement made upon the second marriage of a widow, a fund was vested in a trustee, upon trust, after the deaths of herself and her second husband, for her three children (by name) by her first marriage and the children of the intended marriage,

(1) 4 Ves. 685.
(2) 2 Ves. 357.
(3) 2 T. R. 241.
(4) 16 Ch. D. 691.

in such shares as she should by deed or will appoint, and in default of such appointment in trust for the said three children, and also the children of the intended marriage, in equal shares. There was no issue of the second marriage. The wife survived her second husband and died in 1878. By her will made in 1876 she appointed, that the trustee of the settlement should stand possessed of one-third part of the trust funds upon trust to pay the income to her son *Charles Long* during his life, and after his death upon trust to pay the said one-third part to *Arthur Long*, the son of her son *Charles*, as and when he should attain twenty-one, and, in case he should die before he should attain twenty-one, upon trust to pay the said third part to her daughter, the defendant *Sarah Ovenden*. *Jessel*, M.R., said (1): "Of course the appointment to the grandson is void, he not being an object of power; but the appointment, if he dies under twenty-one, in favour of an object of the power will take effect as being within the limits of the rule as to remoteness." That is, it was an executory gift, not a gift in remainder, and, as it was to take effect within the proper period of time, it was valid.

But it is said that in the present case there is a distinction, because it is not a limitation to persons not objects of the power, but a delegated power to appoint to such persons, which is bad, and it is said that certain observations of Lord *St. Leonards* in his book on Powers are in favour of the Petitioners. The important passage is in plac. 36, page 515, of the 8th edition, and I confess that I have felt a good deal of difficulty in understanding precisely what that passage means, but I think I do understand it at last.

In plac. 34 the learned author (referring to limitations as distinguished from powers) says: "Where no question of perpetuity arises, and the power authorizes a gift in remainder, a devise under a power to a stranger for life, with remainder to an object of the power, is void only as to the life estate, and valid as to the remainder, and the estate during the life of the stranger will go as in default of appointment." Then, in plac. 35, he says: "So where actual estates are not attempted to be given, but a mere power is limited to a stranger to appoint the fund, and in default

(1) 16 Ch. D. 693.

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of appointment the fund is given amongst proper objects, the power being merely void on the ground that *delegatus non potest delegare*, the ultimate limitation will take effect in possession. This was decided by Lord *Hardwicke* in *Ingram* v. *Ingram* (1), where, however, the delegated power was to appoint the fund amongst the objects of the original power, and in default of appointment, the fund was given to the same objects." He then proceeds to point out that to the general rule previously stated there may be exceptions, and that, although that rule may apply to such a case as *Ingram* v. *Ingram*, there are other cases to which it does not apply. He says in plac. 36: "It should seem that the rule would not prevail" (that rule being, as I understand it, that the ultimate limitation would take effect in possession where the donee of the original power had attempted to create a power of appointment which was void merely on the ground that the power could not be delegated) "where a power is affected to be given to appoint the fund amongst strangers." That is the proposition. What is the reason for it? "because in that case it would be the intention of the donee of the original power, that the object should not take unless in default of execution of the delegated power in favour of the strangers. The intention of the donee of the power is the express ground upon which limitations over to good objects, after limitations to strangers, are held to be void; and the principle applies as forcibly to a power to appoint to strangers as to a direct gift to them." Now one of the passages in which Lord *St. Leonards* points out the reason why the intention of the donee of the power is the ruling principle in the case of limitations will be found in plac. 22 of the same chapter: "Although a limitation be void, as not authorized by the power, yet it is not considered absolutely void, so as to accelerate the remainders dependent on it, which, if given immediately, would have been good; but, notwithstanding that it be void itself, yet it prevents the limitations over from taking effect; for, as Lord *Alvanley* observed, it would be monstrous to contend that though it was appointed to the remainderman in failure of the existence of persons incapable of taking, yet notwithstanding they exist, he should take it as if it was well appointed to them, and they

(1) 2 Atk. 88.

had failed. It is given upon a contingency, upon which there is no right to give it." He points out then that the intention of the person who is exercising the power is to be attended to; and in plac. 36 he points out, that the reason why the ultimate limitation does not take effect in possession where a power is affected to be given to appoint the fund amongst strangers is, because that would be contrary to the intention of the donee of the original power. He says, to read the passage again, "because in that case it would be the intention of the donee of the original power, that the object should not take unless in default of execution of the delegated power in favour of the strangers." The reason why the ultimate limitation is not good is, because the intention of the donee could not take effect if it were. But his intention can take effect in case of default of exercise of the delegated power, and Lord *St. Leonards* is only dealing with a case in which the donee's intention cannot take effect; that is, where there has not been default in the exercise of the delegated power. When the donee of a power delegates it his intention is, that the persons who are to take in default of an exercise of the power shall only take subject to the preference previously given to other persons, and that they shall take only if there are no preferred persons who can take, and that state of things can not arise when the delegated power has been actually exercised in favour of persons who are only unable to take because not within the power. I think the subsequent part of plac. 36, which is not very easy to understand, really comes to the same thing: "Nor would the rule, for the same reason, apply to a case where the delegated power is to appoint to some of the objects, and the fund in default of appointment is given to others, although objects of the original power." To make that clear, let me take the objects to be *A.*, *B.*, *C.*, and *D.*, and read the sentence again, putting it with reference to them: "Nor would the rule, for the same reason, apply to a case where the delegated power is to appoint to *A.* and *B.*, and the fund in default of appointment is given to *C.* and *D.*, although *C.* and *D.* were objects of the original power." Why?—"For the same reason," viz., that the intention of the donee would be defeated, because he intended that *A.* and *B.* should be preferred to *C.* and *D.*, and it would be going entirely contrary to his

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intention to give the fund, in default of exercise of the power, to *C.* and *D.*, while *A.* and *B.* are in existence, whom he intended to prefer. Lord *St. Leonards* goes on to say: "But in this last case it might be otherwise if, in default of appointment under the delegated power" (to *A.* and *B.*) "the fund was given amongst all the objects," *A.*, *B.*, *C.*, and *D.* And, for this reason, that, though it would be clear in that case that there was an intention, if possible, to prefer *A.* and *B.*, it would not at all follow that the donee's secondary intention in favour of *A.*, *B.*, *C.*, and *D.* should be disappointed, if they all could take and *A.* and *B.* alone could not. There would be the remaining intention in favour of all the objects, and it would not be preferring persons who were intended to be postponed in favour of those who were designated, but it would be merely saying, that, if the preferred objects could not take, all the persons who were to take in default of an exercise of the delegated power, should take. This, to my mind, explains the whole passage, and shews that the learned author is dealing with a case where the delegated power of appointment, although invalid, has been exercised, and cannot, therefore, be ignored, and, in such a case, the gift in default of appointment cannot take effect, because it was intended by the donee that the persons to take in default should take only if the persons whom he intended to prefer did not exist, and therefore could not take.

I have thought it right to make these remarks on the observations of Lord *St. Leonards* in that passage, but the matter seems to me to be really settled by the authority of two cases decided since the last edition of his book was published. The first of these cases is *Carr* v. *Atkinson* (1). In that case *George Smith* by his will devised land to trustees, in trust for his niece *Hannah Carr*, during her life, and after her death in trust for her children or remoter issue as she should appoint, and in default of such appointment in trust for her children equally. *Hannah Carr*, by her will, in exercise of the power, appointed that the trustees of *George Smith's* will should stand seised of the land upon trust to convey the same to trustees therein named, upon trust as to one fifth part thereof for her daughter,

(1) Law Rep. 14 Eq. 397.

Mary Hartley Atkinson, during her life, for her separate use, and after her death upon such trusts for the benefit of any surviving husband of *Mary Hartley Atkinson* for the term of his life, or for any shorter period, as she should by will appoint, and subject thereto in trust for such child or children of *Mary Hartley Atkinson* as had attained or should thereinafter attain twenty-one, or die under that age leaving issue, and, if more than one, in equal shares. *Mary Hartley Atkinson* was alive at the date of the will of *George Smith*, as appears from the date of her marriage, which is stated in the report. The question was raised, whether the appointment of the one-fifth in favour of *Mary Hartley Atkinson*, her husband and children, was not wholly void, except as to the life estate appointed to her. Lord *Romilly*, M.R., said (1): "The share is given in trust for *Mary Hartley Atkinson* for her life, which is a good appointment, as she is an object of the power, and for such of her children as should attain twenty-one, who are also objects of the power; but then there is interposed, not a gift to a person who is not an object of the power, but a power for *Mary Hartley Atkinson* to appoint by will in favour of a person who is not an object of the power. It is important to look at the exact words: 'In trust for *Mary Hartley Atkinson* during her life . . . and after her decease upon such trusts for the benefit of any surviving husband of the said *Mary Hartley Atkinson*, for the term of his life or for any shorter period, as she should notwithstanding coverture by her will appoint, and, subject thereto, in trust for' her child or children, as in the will mentioned. This is an attempt to create a new power, which cannot be created, in a person who was merely an object of the power. This is a case arising in respect of real property. Supposing it had been given upon such trusts and in favour of such charities as *Mary Hartley Atkinson* should by will appoint, and, subject thereto, to her children, could it be said that the gifts to the children were destroyed because of the insertion of a power which the Court would not allow to be exercised? The result is, that the power to appoint in favour of the husband fails, being a delegated power which could not be given by the person who was entitled to exercise the first power, and the will is to be read as

(1) Law Rep. 14 Eq. 401.

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if the words which relate to it formed no part of the will, and the construction of the rest of the will is not affected by it."

The other case is *Webb* v. *Sadler* (1). In that case a husband and wife, having, under their marriage settlement, a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed one-third of the fund to trustees, upon such trusts as *Henry Robert Sadler* (one of the sons) by deed, executed with the consent of the father during his life, and after his death with the consent of the acting trustees or trustee of his will, or by will, should appoint, and, in default of such appointment, upon trust for *Henry Robert Sadler* for life, or until bankruptcy or assignment (such bankruptcy or assignment being limited to twenty-one years after the death of his surviving parent); and after the death of *Henry Robert Sadler* upon trust for his executors or administrators, as part of his personal estate, but, if his interest should have previously determined, then upon other trusts. The Court of Appeal held that the appointment to such uses as *Henry Robert Sadler* should appoint with the consent of the trustees was void, but that the limitation over in default of appointment by him was valid. Lord *Selborne*, L.C., said (2): "Here it appears to us quite clear that no power of appointment whatever is given to *Henry Robert Sadler* by the first clause of the first deed-poll and the corresponding clause in the other instrument, excepting the power to be exercised, with the consent in writing, after the death of the parents, of the acting trustees or trustee, who were persons to whom no such authority could be delegated, independently of any question of remoteness. If, therefore, that is an inseparable condition of the exercise of the power, the power altogether fails. We all think it is an inseparable condition of the exercise of the power. There is no analogy between the effect of such a clause and the cases where there is a separate and superadded condition after the gift of an estate. Here there is no power except with consent. Then the next question is, whether the subsequent appointments, 'in default of and subject to any such limitation or appointment,' containing dispositions in favour of the son, are so connected with the void power, that, the void power failing,

(1) Law Rep. 8 Ch. 419. (2) Law Rep. 8 Ch. 426.

they fail also. It seems to me that such a construction would be expressly contrary to the declared intention. The declared intention is, that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and, if the power is void, then no such estate could be created, and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect."

Applying those observations to the present case, the declared intention of the testator is that, unless his son, *R. K. Lane*, exercises the power of appointment given to him in favour of his children, the trust in default of appointment is to take effect, and, inasmuch as the son could not validly exercise the power, no such limitation in favour of his children could be created, and therefore the ultimate trust in favour of the son takes effect. It is said that in the cases to which I have referred the objects contemplated by the delegated power were within the original power; whereas in *Carr* v. *Atkinson* (1) the husband of the daughter was not an object of the original power. But it seems to me that the result must be the same, whether the invalidity of the power depends upon the person by whom, or the objects in whose favour, it is to be exercised.

Solicitors: *Gregory, Rowcliffes, & Co.; Futvoye, Field, & Baker; Sewell & Edwards.*

(1) Law Rep. 14 Eq. 397.

W. L. C.

NORTH, J. 1887 March 19, 26.

In re ST. BOTOLPH WITHOUT BISHOPSGATE PARISH ESTATES.

"*Charity Property*"—*Jurisdiction of Charity Commissioners—Property held on trust "for the use and benefit of" a Parish—City of London Parochial Charities Act*, 1883 (46 & 47 *Vict. c.* 36), *ss.* 5, 10, 11.

Under the provisions of the Act 35 Geo. 3, c. 61, passed in 1795, a piece of land was vested in trustees for the purpose of building a workhouse for the poor of a parish in the city of *London*, and power was given to raise £10,000, to pay for the land and the building, by the grant of annuities for lives or years, which were to be charged on rates which the Act authorized to be levied on the parishioners. The Act provided that the land should be held "for the use and benefit of the parish." The workhouse was built, and was used for many years for the poor of the parish. In 1837 a poor law union was formed, and, the workhouse being no longer required, the income of the property was thenceforth applied in aid of the poor-rates of the parish:—

Held, that the property was "charity property" within the meaning of the *City of London Parochial Charities Act*, 1883, and was subject to the jurisdiction of the Charity Commissioners under that Act.

THIS was a petition (entitled in the matter of the *City of London Parochial Charities Act*, 1883) by the trustees of the parish estates of *St. Botolph Without Bishopsgate*, in the city of *London*, and the churchwardens and the overseers of the poor of the parish, asking for a declaration that certain property, known as the "*Peter Street* estate," was not "charity property" within the meaning of the above Act of 1883.

By indentures of lease and release, dated respectively the 19th and 20th of June, 1794, a piece of land situate in *Peter Street*, in the parish of *St. Botolph*, was conveyed in fee to the then rector of the parish and certain other persons, who were described as parishioners and householders of the parish and trustees named and appointed by and on behalf of the parishioners, or the major part of them, in vestry assembled, for the purpose of building a workhouse.

By the Act 35 Geo. 3, c. lxi., it was enacted that the then rector of the parish and other persons (being the same persons as were parties to the deeds of June, 1794) and their successors should be trustees for putting the Act in execution, and provision

was made for appointing new trustees whenever any of the said trustees should die, or refuse, or be disabled to act, or should remove out of the parish. The trustees were by sect. 7 authorized to raise upon annuities for lives or terms of years a sum not exceeding £10,000, which was to be applied in or towards the purchase of the said piece of land in *Peter Street*, and for and towards the building of a workhouse and such other buildings thereon as should be necessary for the relief and employment of the poor of the parish, and for and towards furnishing such workhouse, and such other buildings, and other the purposes of the Act, and to and for no other use or purpose whatsoever. It was enacted, by sect. 9, that the annuities so to be purchased should be charged on the rates to be made on the parishioners under the provisions of the Act. Sect. 12 contained a recital of the conveyance of 1794, and provided that the same should be an effectual and sufficient conveyance to the trustees, and their heirs and assigns for ever, "for the use and benefit of the said parish," and the same was thereby ratified and confirmed accordingly, and it was provided that the persons who had advanced the money required to pay for the purchase of the land should be repaid the same, with interest, out of the moneys to be raised by virtue of the Act. And it was further provided by sect. 16 that the rector, churchwardens, overseers of the poor, and inhabitants of the parish, were thereby authorized and required to meet together in the vestry room of the parish quarterly, or oftener, every year, as occasion should require, and should make such rate or rates, assessment or assessments, for paying the interest due on the said moneys, and for or towards the relief of the poor of the parish, and for the other purposes of the Act, upon all and every person or persons who should inhabit, hold, occupy, &c., any land, house, &c., within the parish, and on every other person or persons who by law was or should be chargeable or liable to be assessed for or towards the relief of the poor of the parish, as they the said rector, &c., or the major part of them, at such meeting or meetings, should think necessary and proper to be rated and assessed. Sect. 23 provided that the rates to be made under the Act should be recovered in the same manner as poor-rates.

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In pursuance of the Act the trustees built on part of the land a workhouse for the poor of the parish by means of the funds raised under the Act, and in March, 1816, the remainder of the land was demised by the trustees to trustees for the parochial charity schools of the parish.

In 1837 the *East London Poor Law Union* was formed, which included the parish of *St. Botolph*, and the workhouse, being no longer required for the poor of the parish, was rented by the guardians of the union as the workhouse of the union until the year 1855, when a new workhouse was built for the union. After this the *Peter Street* workhouse was let by the trustees to other persons, and the rents and profits thereof were applied for the use and benefit of the parish in aid of poor-rates. In 1865 the property was taken by the *Great Eastern Railway Company* for the purposes of their undertaking, and the purchase-money paid by them was invested in the purchase of other property which was conveyed to the trustees, and the annual income of this property was until the month of June, 1884, paid over by the trustees to the churchwardens and overseers of the parish, and applied by them in aid of the poor-rates of the parish. The income of the property had never been included in the accounts of the charity property of the parish which had been annually furnished to the Charity Commissioners, and, until the passing of the Act of 1883, the trustees were never required by the Commissioners to render to them any accounts relating to the property, but the income had always been included in the half-yearly accounts of rates and other moneys received by the overseers of the poor of the parish, which accounts had been regularly submitted to and audited by the poor law auditor appointed by the Local Government Board. After the passing of the Act of 1883 the Charity Commissioners required that the payment of the income of the "*Peter Street* estate" for the purposes of the poor-rates should be discontinued, and from that time the income had been accumulated. In December, 1886, the Commissioners published a statement, in pursuance of sects. 5 and 8 of the Act of 1883, and they included the "*Peter Street* estate" in a schedule of the general charities of the parish annexed to the statement.

Everitt, Q.C., and *E. Ford*, for the Petitioners:—

This property is not "charity property" within the meaning of the Act of 1883 (1). The property was originally purchased

(1) Sect. 2 provides: "The Charity Commissioners for *England* and *Wales* (hereinafter called the Commissioners) shall be Commissioners under this Act and have the following powers for the purposes thereof, viz. (*inter alia*):"

"(3.) Power to determine whether any property is or is not charity property subject to the powers of this Act."

Sect. 5: "The Commissioners shall as soon as may be proceed to inquire into the nature, tenure, and value of all the property and endowments belonging to the charities mentioned in the Digest of Parochial Charities of the City of *London*, referred to in the Thirteenth Report of the Charity Commissioners for *England* and *Wales*, and every of them, and every other charity the property or income of which is applicable or applied to or for the benefit of any parish or part of a parish within the city of *London* or of any inhabitant or inhabitants thereof (hereinafter called the said parochial charities), and the purposes or trusts for or upon which the same have heretofore been or are now held or enjoyed and to which the income thereof has been or is now applied, and shall classify the said property in two schedules. They shall place in one of such schedules all property (hereinafter called 'ecclesiastical charity property') which shall be proved to their satisfaction to have been originally given to or for, or to have been duly ordered by any Act of Parliament, judgment of a Court, or other authority competent in that behalf, to be applied to or for, and to have been accordingly applied to or for any spiritual purpose which is now a legal purpose, or for the benefit of any spiritual person as such, or for the erection, maintenance, or repair of any ecclesiastical buildings, or for the maintenance of divine service therein, even although such purpose may now have failed, but the user of property for an ecclesiastical or any other purpose shall not be conclusive evidence that such property was originally given for such a purpose, but shall be taken into account by the Commissioners in determining whether in each case such property is or is not to be deemed to have been originally given for such a purpose, provided that no property shall be deemed to be ecclesiastical which shall not have been given or applied to or for or in connection with the Church of *England*. In the other of such schedules they shall place all other charity property (hereinafter called 'general charity property'). The Commissioners shall specify in the said schedules the objects or purposes to or for which the said property is now applied, and all vested interests now existing in or upon or in anywise affecting any part of such property."

Sect. 8: "The Commissioners shall in such form as they may think most convenient print and publish a statement or successive statements containing the findings and determinations at which they shall have arrived in the course of the inquiry aforesaid."

Sect. 10: "Any person claiming any vested interest affecting any endowment mentioned in any such statement, and alleging that the Commissioners have not duly recognised such vested interest, or any person or persons alleging that any property which the Commissioners have deter-

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by means of money raised on the security of rates in the nature of a poor-rate, levied on the parishioners under the provisions of the Act of *George* III., and the income has been, since the time when the workhouse was no longer required, applied in aid of the poor-rates. This is not a charitable purpose. It is a public purpose, but not a charitable purpose in the ordinary sense of the term: *Burnaby* v. *Barsby* (1); *Attorney-General* v. *Heelis* (2); *Finnis to Forbes* (3). *Attorney-General* v. *Heelis* is modified by *Attorney-General* v. *Eastlake* (4) only to this extent, that, whatever the source from which property has been originally derived, it will be treated as charity property, if it is really devoted to a charitable purpose. But in the present case the purpose is not charitable. *Attorney-General* v. *Webster* (5) does not apply. The

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mined to be charity property within the meaning of this Act is not charity property, but that he or they is or are entitled to the same free from any charitable trust affecting the same, may within two months from the date of the publication of such statement apply to the High Court of Justice, by petition or summons at Chambers, asking for a declaration that he has a vested interest affecting such endowment or that such property is not charity property (as the case may be). The Commissioners may appear upon any such proceedings, and the decision of the Judge before whom such petition or summons is heard shall be final (unless special leave to appeal shall be by him given). The Judge shall make a declaration in conformity with the justice of the case, and shall have power to order that the costs of the application shall be paid out of the endowment or property in question or by any party to the application as he may think right. Whenever necessary the Commissioners shall amend their statement so as to make it conform to the Judge's declaration."

Sect. 11: "The Commissioners shall, as soon as may be after the publication of the statement or statements aforesaid, proceed to prepare a scheme or schemes for the future application and management of the charity property and endowments so classified by them as hereinbefore directed."

Sect. 41 provides (*inter alia*) that "no moneys arising from any such charity or endowment shall after the passing of this Act be applied to the payment of any poor-rate or other rate or public charge whatsoever, or to the payment to any parish official of any salary or remuneration, except so far as he may be entitled to receive the same in respect of duties actually performed in connection with the services of the church, or of services actually rendered in or about the management of any parochial charity, or of duties actually performed in connection with public worship in the church of the parish."

(1) 4 H. & N. 690.
(2) 2 S. & S. 67, 77.
(3) 24 Ch. D. 587.
(4) 11 Hare, 205.
(5) Law Rep. 20 Eq. 483.

recent unreported case *In re St. Bride's, Fleet Street, Church or Parish Estate* (1) may be relied on against the Petitioners. But by reason of the great fire of *London*, and the only evidence we have of the purposes to which they have been applied is this. First of all, we have the accounts of the churchwardens of the parish for years, from which it is clear that the income of the property has been applied to parish purposes. That is clear beyond question. Secondly, we have the fact that the leases have always been granted, either by persons filling the office of churchwardens, with the concurrence of the overseers, or with the concurrence of the vestry of the parish. Beyond that we have no evidence. As regards the minor properties we have no evidence. One of them seems to be a very ancient charity indeed, and to have been the subject of litigation so far back as the time of Lord *Coke*, and another certainly was raised chiefly by means of parish rates, that is, the money was raised chiefly from parish rates, and in other respects by the grant of annuities secured on parish rates, the money thus raised being invested in the purchase of a workhouse, the necessity for which having ceased, the income has been since applied to general parish purposes. That being so, it seems to me clear that the authorities referred to, *Attorney-General* v. *Eastlake* (11 Hare, 205); and *Attorney-General* v. *Webster* (Law Rep. 20 Eq. 483), shew that these properties are held subject to charitable trusts, and therefore are mere charities. As regards the origin of the properties, in some cases we have no evidence, but, as I understand *Attorney-General* v. *Eastlake*, that is immaterial. What the Court has to look to is, the purposes for which the property is held, and the way in which it ought to be applied. In *Attorney-General* v.

(1) M.R. April 16, 1877.

In re St. Bride's, Fleet Street, Church or Parish Estate.

The question in this case was whether certain property of the parish of *St. Bride, Fleet Street*, was subject to the *Charitable Trusts Acts* of 1853 and 1855, and therefore under the control of the Charity Commissioners. The property consisted of several freehold houses in the parish. As to some of them, the sources from which they were derived was unknown; as to others, the title deeds had been destroyed by the great fire. The leases of the houses had been usually granted by the vicar and churchwardens, and the income of the property was applied to parish purposes. This was a motion by the Charity Commissioners, under sect. 14 of the Act of 1853, and sect. 7 of the Act of 1855, to commit the churchwardens and vestry clerk for contempt of Court in not delivering accounts of the property as required by the Commissioners. The Respondents were willing to give an undertaking to account, if the Court should be of opinion that they were bound to do so.

Waller, Q.C., and *Vaughan Hawkins*, for the Commissioners.

Marten, Q.C., and *Everitt*, for the churchwardens and vestry clerk.

Jessel, M.R.:—

The questions raised by this motion are of some singularity, but the main questions are, I have no doubt, concluded by authority. The first question is, whether these properties are held for charitable purposes? As regards the bulk of the properties, the deeds relating to them have been lost

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that case is distinguishable from the present case in which the property is not applicable to general parish purposes, but is held on a particular trust. By virtue of the Acts 4 & 5 Will. 4, c. 76, sect. 85, and 5 & 6 Will. 4, c. 69, sect. 3, such property was subject to the directions of the Poor Law Commissioners, and the Local Government Board is now substituted for the Poor Law Commissioners.

Sir *H. Davey*, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners:—

If the trust on which this property is held was not a charitable trust, it would be void as offending the rule against perpetuities. A trust to apply property in aid of poor-rates is clearly a charitable trust. Property held on trust for the use and benefit of a parish is "charity property": *Attorney-General* v. *Blizard* (1); *Attorney-General* v. *Lord Hotham* (2); *Attorney-General* v. *Webster* (3); *Attorney-General* v. *Mayor of Wigan* (4); *Attorney-General* v. *Mayor of Liverpool* (5). *Burnaby* v. *Barsby* (6) and *Finnis to Forbes* (7) are distinguishable. *Attorney-General* v. *Heelis* (8) has been overruled so far as it decided that the material

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Webster I decided, following a previous decision, that an application of income to the general purposes of a parish is a charity. Such an application could not be legally supported as a valid trust in any other way. It was urged that the property was bought by the parish, but the parish as such cannot buy property, because it has no corporate existence. No doubt the vestry can buy property for the benefit of all the persons who may be parishioners, and for the benefit, in some sense, of anybody who may happen to be in the parish at the moment, but that is not a private foundation which can legally exist as enjoying anything for its own benefit in the same way as a guild or other corporation of that kind. That being so, these are plainly charity properties.

[His Lordship then decided that the property in question was held for a charity as defined by sect. 66 of the *Charitable Trusts Act* of 1853, and, the Court being of opinion that a contempt had been committed by the Defendants in their refusal to deliver the accounts required by the Commissioners, upon the undertaking of the Defendants to deliver the accounts, they were ordered to pay the costs of the application.]

This decision was affirmed by the Court of Appeal, W. N. 1877, p. 149.

(1) 21 Beav. 233.
(2) T. & R. 209.
(3) Law Rep. 20 Eq. 483.
(4) Kay, 268.
(5) 1 My. & Cr. 171.
(6) 4 H. & N. 690.
(7) 24 Ch. D. 587.
(8) 2 S. & S. 67.

question is from what source the property has been derived, and it is now well established that the material question is, to what purpose is the property to be applied: *Attorney-General* v. *Eastlake* (1); *Attorney-General* v. *Compton* (2). *The St. Bride's Case* is identical with the present case.

If the trust is not construed to be a charity it will be bad as a perpetuity.

[NORTH, J.:—That difficulty may be got over by the fact that the trust was created by statute.]

Still the construction of the words must be the same, whether they occur in a statute or in a deed or will. The Act of *George* III. constitutes a trust "for the use and benefit of the parish," which is clearly a charitable trust, and the general Poor Law Acts which have been referred to do not in any way affect this trust. If the property were sold under the provisions of the Act 5 & 6 Will. 4, c. 69, the proceeds of sale would be held on trust for the use and benefit of the parish.

Sect. 41 of the Act of 1883 confirms the view that this property is "charity property" within the meaning of the Act.

Everitt, in reply.

NORTH, J. (after stating the facts of the case, and the material provisions of the Act of 1883, continued):—

The question is, whether this property, so used for a time for workhouse purposes, and since used for no other purpose than general parish purposes, is "charity property."

It seems to me that it is. The 12th section of the Act of 1795 provides that the property is to be held "for the use and benefit of the said parish." That, in my opinion, beyond all question, amounts to a declaration of a trust for a charitable use or purpose, and exactly in accordance with that the Petition states, and, in my opinion, correctly, that the property has been applied from that time forward for the use and benefit of the parish.

But it is said on behalf of the Petitioners that this is only one of numerous instances in which property was acquired for

(1) 11 Hare, 205. (2) 1 Y. & C. (Ch.) 417.

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workhouse purposes; that the general purposes of such acquisition were dealt with by general Acts of Parliament, and that those Acts tend to shew that such property was, though parochial property, not a charitable property. The Acts referred to are the 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69.

I can see nothing in those Acts to prevent the purpose to which the funds are devoted from being a charitable purpose. It seems to me that it clearly would be a charitable purpose, and the fact that the authority of the Poor Law Commissioners is required for any dealing with the fund, does not in any way alter the effect of it.

Then it is said, that it is important to look at the source from which the funds were derived. On this point I think it is sufficient to refer to *Attorney-General* v. *Eastlake* (1). There, *Wood*, V.C., after referring to *Attorney-General* v. *Heelis* (2), and other authorities, said (3): "However, Lord *Eldon*, in the case of *Attorney-General* v. *Corporation of Dublin* (4), adheres distinctly to the view which he had taken in the earlier case (5); and there can be no doubt that the conclusion of the House of Lords was, that the mode in which the rate was levied was not to be looked at, but the purpose to which it was to be applied; and I apprehend the purpose must be the real criterion. If a number of persons assemble together to make a square, as suggested by Mr. *Rolt*, or to allot a portion of building-ground belonging to themselves in any particular manner, then if, to obviate the difficulty of raising or collecting subscriptions to the square, they apply for and obtain an Act of Parliament, giving the power of levying on every person inhabiting the houses which are about to be built on their own property, and thus compelling them to contribute and pay rates towards the maintenance and improvement of that property into whatever hands it may pass, the purpose is a distinct private purpose for the exclusive benefit of those individuals who are dealing with their own property, or those who may subsequently acquire interests under them. But when you come to the purpose of

(1) 11 Hare, 205.
(2) 2 S. & S. 67.
(3) 11 Hare, 221.
(4) 1 Bli. (N.S.) 312.
(5) *Attorney-General* v. *Brown*, 1 Swans. 265.

paving and lighting a town, which is for the benefit of all the inhabitants,—for the benefit of the poor inhabitants who walk through the streets, and of others who may resort there from all the neighbourhood,—persons who drive their carts and waggons through the streets, including the mail coaches or other vehicles that have to pass through the town, and in fact every class of the Queen's subjects,—one does not need then to look at this recital, by which we are told, that amongst other things there will be benefited the *Royal Naval Hospital*, the *Royal Marine Barracks*, and other public establishments. It is sufficient to say, it is a large and general purpose for this town, although not beyond the limits of the town, and that, for that purpose, certain moneys are to be levied. I cannot see that the source from which those moneys are here derived, viz., from taxation, can make any difference as to the charitable or public nature, and which would be attributable to the funds if they proceeded from a more limited sphere of bounty; and, if there be no distinction on that ground, the Attorney-General is the proper person to represent those who are interested in that general and public or charitable purpose." It seems to me that that authority, which has, I think, established the law from that time to the present, is strongly against the contention of the Petitioners.

Again, in *Attorney-General* v. *Blizard* (1), there was a grant by the Crown to the vestry of *Richmond* of a portion of the common for a workhouse and a cemetery, and "in trust for the employment and support of the poor of the parish." The decision was that, although it was a charity, the income might properly be applied in aid of the poor-rates, and so in relief of the parish. And Lord *Romilly*, M.R., said (2): "Money and, subject to the provisions of the *Mortmain Act*, land given for the benefit of a parish and in aid of their general parochial burdens, is a perfectly good and valid charitable trust, and one which will be enforced by this Court, although for the benefit of ratepayers." He went on to comment upon the statute of *Elizabeth*, and then he said (3): "But my decision is, that on the evidence before me, the income does not appear to have

(1) 21 Beav. 233. (2) 21 Beav. 248.
(3) 21 Beav. 249.

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been applied in aid of the poor-rates of the parish of *Richmond*, which, in my opinion, was the charitable trust for which this land was granted, and which is specified by the provisions of the statute in question, and that, if otherwise employed, this Court would, if called upon, interfere to prevent such employment." Therefore he recognised the application of the fund in relief of the poor-rates as a proper application of a charitable trust.

But the matter does not rest there, because in two later cases property of a similar nature was expressly dealt with. In *Attorney-General* v. *Webster* (1) the property had been acquired originally by the parish for certain uses which were then charitable uses. Those uses were afterwards avoided by statute as being superstitious, and an arrangement was made by which part of the property was given up to the person who had become entitled to it, and the rest of it was to be given up to the parish, to be enjoyed, as the whole had been previously enjoyed, by the same persons by whom it had been previously enjoyed, and from that time forward it was vested in certain persons named, to the use of the parish. That was the conclusion at which *Jessel*, M.R., arrived upon the evidence before him. The income was applied after that time to general parochial purposes, including the salary of the sexton, and disbursements for cleaning the channel of the street, and ringing the bells, and various other matters of a similar character. *Jessel*, M.R., after stating why he came to the conclusion that the income of the property had been applied for "charitable" purposes, continued (2): "That being so, we have a case where property was purchased for the benefit of a parish, and which has been used now for nearly three centuries for charitable purposes; and that being so, I have not the slightest doubt or hesitation in saying that if there had been no authority whatever on the subject, there could be no question that this was property held for charitable purposes. But there is authority distinctly in point, the case of *Attorney-General* v. *Lord Hotham* (3), which is entirely undistinguishable. In that case the conveyance was 'for the use and benefit of the said parish' —the very same words we have here—and the information stated

(1) Law Rep. 20 Eq. 483. (2) Law Rep. 20 Eq. 491.
(3) T. & R. 209.

'that the rents and profits of the said lands had from time immemorial been received by the churchwardens and overseers of the said parish, and applied in the repairs of the church, in the maintenance of the poor, and in other parochial purposes in aid of the rates.' Therefore, if you want authority, there is express authority; but I say none was wanted, because it is impossible for the defendants to make out how you could have a valid trust for the benefit of the parish or for the parishioners for ever without its being charitable; and no suggestion has been made except a reference to that anomalous line of cases in which it has been said that an advowson can be so held." The difficulty of a perpetuity is, no doubt, got over in the present case by the fact that the devotion of the property to the use and benefit of the parish was sanctioned by the Act of 1795 itself. But I find that in several other cases, in which the trust was not expressed in an Act of Parliament, it has been established, that a gift "for the use and benefit of a parish" must be charitable, because otherwise it would be void as a perpetuity. So in the present case I cannot put any other construction upon precisely similar words, although the same necessity for so holding does not exist, because the words occur in an Act of Parliament.

Lastly there is the *St. Bride's Case* (1), which was decided by *Jessel*, M.R. [His Lordship read the passage from the judgment of *Jessel*, M.R., which is quoted above, and continued:—] So in the present case, it seems to me that this property was acquired for the use and benefit of the parish, and, even under the Act itself, it was devoted in the first instance to the benefit of the poor of the parish. That appears to me to be just as much a trust for the benefit of all the persons living in or connected with the parish, as a trust for the maintenance of the roads of a parish or any similar purpose. And, if anything further were necessary, it seems to me that the 41st section of the Act of 1883 is not unimportant, for in cases in which property has been applied for the relief of the poor in reduction of the poor-rate, that section suspends the application of the funds as heretofore, until the Commissioners have had the opportunity of inquiring into the matter, and making their statement as the Act directs.

(1) *Ante*, p. 147, r.

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Under these circumstances, it seems to me that the Charity Commissioners have dealt rightly with the property in question, and this petition must be dismissed.

Solicitors for Petitioners: *Clapham & Fitch.*
Solicitor for Charity Commissioners: *J. M. Clabon.*

W. L. C.

NORTH, J.
1887
March 24, 26.

BAINES *v.* GEARY.

[1887 B. 1206.]

Agreement in Restraint of Trade—Validity—Reasonableness—Partial Enforcement.

In an agreement for employment as a milk carrier, the servant undertook not to serve or interfere with any customer served or belonging at any time to the master, his successors or assigns :—

Held, that, if on the construction of the undertaking it was not limited to interference with persons who were customers during the employment of the servant, the undertaking was severable, and capable of enforcement in respect of persons who were customers during the employment.

CLEMENT BAINES, one of the two Plaintiffs, a dairyman, and *Thomas Geary*, the Defendant, entered into an agreement in writing, dated the 16th of February, 1885, for the employment of the Defendant by the Plaintiff *Baines* as milk carrier and general servant, determinable at a fortnight's notice on either side. A term of the agreement was as follows :—

" Now the said *Thomas Geary* agrees to enter such service and to faithfully serve the said *Clement Baines*, his successors or assigns, in the said business on the terms and conditions herein expressed, and, in consideration of the wages to be paid to him, he undertakes that he will not, either during such service or after being discharged or quitting such service, serve or cause to be served with milk or any other dairy produce for his own benefit or that of any other person or persons, or, either directly or indirectly interfere with, or cause to be interfered with in any way, any of the customers served or belonging at any time to the said *Clement Baines*, his successors or assigns."

At that time the Plaintiff *Baines* was carrying on business as a

dairy proprietor at *Twickenham*. He in February, 1887, sold his business to the other Plaintiff, *Samuel Horsfall Edelsten*, under an agreement which fixed the 7th of March, 1887, as the time for completion. The agreement was duly carried out.

The Defendant remained in the service of the Plaintiff *Baines* till the 5th of March, 1887, when, in pursuance of a fortnight's notice given by himself, he left. He commenced to carry on business as a dairy proprietor on his own account in partnership with his brother, at *Twickenham*. He had both personally and by circular solicited the custom of persons who had dealt with the Plaintiff *Baines*, and served some of such persons with milk. The Plaintiffs claimed an injunction to restrain the Defendant from acting in breach of his undertaking contained in the agreement of the 16th of February, 1885.

The Plaintiffs moved for an *interim* injunction to restrain the Defendant from "serving, or causing to be served with milk or any other dairy produce, for his own benefit or that of any other person or persons, either directly or indirectly, and from causing to be interfered with in any way, any of the customers served by or belonging to the Plaintiff *Samuel Horsfall Edelsten*, or formerly served by or belonging to the Plaintiff *Clement Baines*," and from otherwise acting in breach of his undertaking.

R. F. Norton, for the Plaintiffs.

MacSwinney, for the Defendant:—

The undertaking sued upon is too wide; it is wider than can be reasonably required for the due protection of the master. It it is most unreasonable that the servant should be debarred from soliciting the custom of or serving persons who did not become customers of the business till after he left the employment. The undertaking is therefore void: *Rannie* v. *Irvine* (1); *Roussillon* v. *Roussillon* (2).

R. F. Norton, in reply:—

The reasonable construction of the undertaking is, that the servant is not to interfere with persons who were customers

(1) 7 Man. & G. 969. (2) 14 Ch. D. 351.

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during the time for which he was employed. The words "at any time," looking at the context, mean "at any time during the continuance of the service." Upon that construction the agreement is most reasonable and will be supported.

1887. March 26. NORTH, J. (after stating the facts, continued):—

It has been argued on behalf of the Defendant that the covenant not to serve or interfere with the customers of the Plaintiff *Baines* or his successors is too extensive, and *Rannie* v. *Irvine* (1) was relied on. In that case the assignor of a lease and the goodwill of the business of a baker agreed, that he would not, during the term assigned, solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent of the assignee. There the covenant was held to be good, but an observation made by *Tindal*, C.J., in his judgment, is relied on. He said (2) "the names of the customers would all appear in the defendant's book, and the restraint was virtually limited to a given number of persons ascertained and agreed upon by the parties at the time." It is argued that, unless the covenant is limited to persons who were customers of the Plaintiff *Baines* at the time when it was entered into, or, at any rate, who became such during the period of the Defendant's employment, it would be too extensive. The terms of the covenant in the present case are no doubt larger than those of the covenant in *Rannie* v. *Irvine*, and it is said that they are too extensive, and that, therefore, the covenant must fail altogether. It is quite clear that a covenant in restraint of trade is good, if it does not go further than is necessary to give reasonable protection to the person who imposes it. There is nothing illegal in such a covenant, but it is considered unreasonable if it imposes a larger restraint than is necessary for the protection of the covenantee. The Courts have, however, seen their way to treat such a covenant as divisible, and to enforce it to the extent to which it is reasonable, while declining to enforce such part of it as is unreasonable. There are many reported cases in which covenants in restraint of trade have been held to be divisible as regards space. I will refer only to one, *Price* v. *Green* (3). In that case

(1) 7 Man. & G. 969. (2) 7 Man. & G. 977. (3) 16 M. & W. 346.

the defendant had covenanted not to carry on the trade of a perfumer within the cities of *London* or *Westminster*, or within the distance of 600 miles from the same respectively, and the Court of Exchequer Chamber held that the restriction as regarded *London* and *Westminster* was reasonable, and enforced it to that extent, but they held that as to the 600 miles the restriction was unreasonable, and therefore could not be enforced. No case, however, was cited to me in which a covenant of this kind had been held to be divisible in regard to time, and I postponed my judgment that I might see if any such case had been reported, and I have found the case of *Nicholls* v. *Stretton* (1). In that case, the defendant on being articled for five years to the plaintiff, who was a solicitor, covenanted that he would not during the five years, nor at any time after the expiration of that term, either directly or indirectly, interfere or intermeddle with, or be concerned, as attorney, agent, or otherwise, for, any person who had already been, or who should from time to time thereafter become or be, the client or correspondent in business of or with the plaintiff, or any partner or partners he might admit to a share or shares with him, or any person or persons to whom he might sell or assign the whole or any part of his business or profession of attorney, solicitor, and conveyancer. Lord *Langdale*, M.R., held that the covenant was not too extensive, and granted an interlocutory injunction to restrain the defendant from interfering or intermeddling with, or being concerned, as an attorney, agent, or otherwise, for any client or correspondent of the plaintiff, or of the plaintiff and his partners, in the plaintiff's business of an attorney, solicitor, or conveyancer. A note to the report states that an appeal was presented from this decision, and that a case was directed to a Court of Law. Either that case, or an action for damages for breach of the covenant, came before the Court of Queen's Bench in *Nicholls* v. *Stretton* (2). In that action two sets of breaches of the covenant were relied on by the plaintiff. The first was in respect of persons who had been clients of the plaintiff before and at the time of the defendant's entering into the covenant; the second was in respect of persons who became clients of the plaintiff afterwards while the defendant continued

(1) 7 Beav. 42. (2) 10 Q. B. 346, 350.

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articled to him. As the judgment of the Court was very short I must refer to the arguments of counsel. Mr. *Bramwell*, for the defendant, who had demurred, contended that "such a covenant almost puts it in the power of the plaintiff to exclude the defendant from all business whatever; and it is much more extensive than can be required for the protection of the plaintiff. There is no limitation as to time or space. . . . Here he would have been fully secured against the loss of business from the opportunities which he gave the defendant, by a covenant that the defendant should not be concerned for any one who had been the plaintiff's client before or at the time of the defendant being with him. . . . But it will be argued that the covenant is good for a part; and that the good part may be severed from the bad. Now, first: the contract is a whole; and every covenant on one side is in consideration of every covenant on the other: and, if any part be void, the whole is void." Mr. *Cowling*, for the plaintiff, argued that even without separating the different parts of this covenant there was no more protection than the particular profession required, the defendant being restricted only as to persons, and not as to place or time. In the course of his argument Lord *Denman*, C.J. said (1): "The body of customers here may alter from time to time. Could you enforce a contract prohibiting a man from dealing with such persons as you might name from time to time?" Mr. *Cowling* then contended that the contract was at least good so far as it concerned the clients who carried on business with the plaintiff at the time of making the indenture, or during the continuance of the articles, and the breaches are confined to these. It is true, he said, that when any contract, whether under seal or not, is in part illegal, the whole contract fails. But that is different from the present case, where the contract is, not to do anything illegal, but only to abstain from certain acts, some of which a party cannot bind himself not to do, but may still legally abstain from doing. In such a case the law will enforce such restrictions as the party can bind himself to. Mr. *Bramwell* replied, and the Court took time to consider their judgment. Lord *Denman*, C.J., delivered the judgment of the Court thus (2): "This case must be decided in favour of the

(1) 10 Q. B. 352–354. (2) 10 Q. B. 356.

plaintiff, in conformity with the decision of *Price* v. *Green* (1) in the Exchequer Chamber."

That decision is precisely in point, and it shews that, although the terms of the covenant were large enough to include all the persons who might be clients of the plaintiff at any time, still it was separable, and was at any rate good as regarded those persons who had been clients of the plaintiff during the time in which the defendant was serving his articles with him, and that the Court considered that, as regards persons who became clients of the plaintiff after the defendant had quitted his employment, the covenant would have been bad. That exactly applies to the present case. Whatever may be the true construction of the agreement—whether it extends or not to persons who might become customers of the Plaintiff *Baines* and his successors after the Defendant had quitted his employment—it would at any rate be good as regards persons who became customers before he left. I must, therefore, grant an injunction, but limited to restraining the Defendant from serving or interfering with any persons who were customers of the Plaintiff *Baines* at any time during the Defendant's employment by him.

Another point taken was that the benefit of the Defendant's covenant was not assignable. It has, however, been held in many cases that the obligation of such a covenant is not limited to the time during which the original covenantee continues to carry on his business. In *Benwell* v. *Inns* (2) the action was brought by the successor in business of the original covenantee, and the point argued was, not that a successor could not sue on the covenant, but that the plaintiff, being only an assignee of part of the business of the original covenantee, was not an assignee of the business within the meaning of the covenant, and was not entitled to sue upon it. It was held by Lord *Romilly*, M.R., that the plaintiff was an assignee, and that he was entitled to sue.

Solicitor for Plaintiff: *Warmington.*
Solicitors for Defendant: *Marshall & Haslip.*

W. L. C.
D. P.

(1) 16 M. & W. 346.

(2) 24 Beav. 307.

NORTH, J.

1887

April 2.

GEE *v.* BELL.

[1886 G. 2322.]

Mortgage—Foreclosure—Writ or Summons—Costs—Claim for Receiver—Judgment in Default of Appearance—Extent of Relief—Rules of Supreme Court, 1883, *Order* XIX., *r.* 10; *Order* XX., *r.* 4; *Order* LV., *r.* 5*a*.

Notwithstanding the provision of rule 4 of Order XX., that, whenever a statement of claim is delivered, the plaintiff may therein extend his claim without any amendment of the indorsement of the writ—the plaintiff cannot, when the defendant does not appear to the writ and a statement of claim is delivered by filing it with the proper officer, obtain judgment in default of appearance for more than he has claimed by his writ.

Semble, that a receiver may be appointed under an originating summons.

THIS was a foreclosure action by first mortgagees against second mortgagees and the mortgagor.

By the writ the Plaintiffs claimed an account of what was due to them for principal, interest, and costs by virtue of their mortgage; that the mortgage might be enforced by foreclosure or sale; and the appointment of a receiver. A receiver was appointed soon after the issue of the writ. The mortgagor did not appear to the writ. The Plaintiffs delivered a statement of claim to the mortgagor, by filing it with the proper officer of the Court, as provided by rule 10 of Order XIX. By the statement of claim the Plaintiffs, in addition to the relief claimed by the writ, claimed personal payment by the mortgagor of the mortgage money, with interest and costs, in pursuance of his covenant contained in the mortgage.

The Plaintiffs now moved upon notice "for such judgment as upon the statement of claim the Court may consider the Plaintiffs entitled to."

The second mortgagees consented to an immediate judgment for foreclosure against them. The mortgagor did not appear.

Nalder, for the Plaintiffs, asked for judgment as claimed.

[NORTH, J.:—How can you have a personal judgment against the mortgagor, when you have not claimed it by your writ? The statement of claim has not been delivered to him.]

The statement of claim has been delivered by filing it with

the officer of the Court, as provided by rule 10 of Order XIX. (1), and rule 4 of Order XX. enables the Plaintiff to extend his claim by his statement of claim, without amending the writ.

NORTH, J.:—

Rule 4 of Order XX. applies only when the statement of claim has been actually delivered to the defendant or his solicitor. It has been held that it does not apply to the case of a defendant who has not appeared to the writ, when the statement of claim is delivered only by filing it. The judgment must be limited to the relief claimed by the writ. But why did not the Plaintiffs proceed by originating summons in Chambers in accordance with rule 5 *a* of Order LV., instead of issuing a writ?

Nalder, for the Plaintiffs:—

The Plaintiffs desired to have a receiver appointed, and, except by consent, a receiver cannot be appointed otherwise than by motion in Court: Annual Practice, 1886–7 (2). As the mortgagor did not appear to the writ his consent could not be obtained. There is no ground for limiting the Plaintiffs' costs to the costs of a summons.

NORTH, J.:—

I will not deprive the Plaintiffs of any costs in the present case. But it must not be supposed that I assent to the view that the Plaintiffs were justified in proceeding by writ instead of by originating summons because they desired to have a receiver appointed. A proceeding commenced by originating summons under Order LV., r. 3, is an action: *In re Fawsitt* (3).

Solicitors for Plaintiffs: *Collyer-Bristow & Co.*, agents for *Bell & Ingoldby, Louth.*

(1) Order XIX., r. 10: "Every pleading or other document required to be delivered to a party, or between parties, shall be delivered in the manner now in use to the solicitor of every party who appears by a solicitor, or to the party if he does not appear by a solicitor, but if no appearance has been entered for any party, then such pleading or document shall be delivered by being filed with the proper officer."

Order XX., r. 4: "Whenever a statement of claim is delivered the Plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

(2) Page 586.

(3) 30 Ch. D. 231.

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1886

Dec. 6, 7, 8, 9, 11, 13, 15.

JACKSON & CO. *v.* NAPPER. *In re* SCHMIDT'S TRADE-MARK.

[1885 J. 974.]

Trade-mark—Registration—Application for Registration before Act of 1883—*Abandonment by Agent of Applicant—Fresh Application by Applicant in respect of same Mark after Act—Three Marks Rule—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 63, 76, 90, 113.

Sect. 63 of the *Trade Marks Act* of 1883 is retrospective in its operation.

There is nothing in the *Trade Marks Act* of 1883 to take away the common law right of an applicant for registration who is *sui juris* to appoint an agent for all the purposes of his application, and if he does so the notices required by the Act may properly be sent to him through such agent.

S., a foreigner, applied in 1876, through an English trade-mark society, for registration of a trade-mark. The *Cutlers' Company* gave notice of a similar mark which had been assigned by them, and the Registrar thereupon wrote to *S.* at the society's address to say that he could not proceed with the application until *S.* had obtained the leave of the Court. This letter was never communicated to *S.* by the society, who proceeded no further with the application; but *S.* having seen the advertisement of his application in the *Trade Marks Journal* believed that his mark had been registered, and *N.*, an agent of his, sold goods in *England* marked with his mark. In the year 1877 the Plaintiffs registered a mark resembling the *Cutlers'* mark, and in 1883 brought an action against *N.* to restrain him from infringement, and *S.*, finding his mark was not on the register, then made a fresh application for registration:—

Held, that *S.* was "in default," and that his original application must be deemed to have been "abandoned" within the meaning of sect. 63 of the Act of 1883, and could not now be proceeded with.

But *held* also, that *S.* being under no disability from laches or conduct was not barred either by sect. 3 of the Act of 1875 or by sect. 76 of the Act of 1883, and was entitled to make a fresh application for registration.

THIS action was brought by *William Jackson & Co.*, of *Sheaf Island Works, Sheffield*, as the registered proprietors of a trade-mark No. 4070, for classes 5, 12, and 13, which classes consist of unwrought and partly wrought metals and manufactured cutlery, and edged tools and metal goods, in order to restrain the Defendant *Sydney Napper* from offering for sale or dealing in any steel or hardware goods not manufactured by the Plaintiffs, bearing

the Plaintiffs' mark or any mark so nearly resembling the Plaintiffs' as to be calculated to deceive.

The Plaintiffs' trade-mark consisted of a carpenter's square crossed by a compass and surmounted by a Maltese cross; and on the 16th of March, 1876, they applied for, and in June, 1877, obtained, registration of this mark for the above-mentioned classes of goods under the *Trade Marks Registration Act*, 1875.

The writ in the action was issued on the 26th of June, 1885, and the statement of claim was delivered on the 27th of June, 1885. The Defendant *Sydney Napper* on the 20th of July, 1885, put in a statement of defence, in which he alleged that he was the agent in *England* of the firm of *Johannes & Emanuel Schmidt*, who trade at *Elberfield*, in *Germany*, as manufacturers of iron and steel goods under the style of *Peter Ludwig Schmidt*, and that they and their predecessors had ever since the year 1790 continuously used upon all their manufactured goods a trade-mark not identical with, but somewhat similar to, that of the Plaintiffs, consisting of a carpenter's square crossed by a compass, but without the Maltese cross upon it, and that they had ever since the year 1851 been in the habit of importing into and had sold in *England* large quantities of steel and iron goods manufactured by themselves, some of which bore this mark, but they had never imported into *England* any goods in class 5 bearing this mark, and he further alleged that on the 24th of March, 1876, *Peter Ludwig Schmidt*, a member of the firm, was registered as the proprietor of this mark, and that the Defendant *Napper* was entitled to use it as the agent for the firm.

The Defendant afterwards discovered that this defence was in one respect unfounded, for *P. L. Schmidt* had never in fact been registered as the proprietor of that trade-mark; and accordingly on the 12th of August, 1885, an amended defence was put in by which he denied infringement, and alleged that on the 24th of March, 1876, *P. L. Schmidt* made application under the provisions of the *Trade Marks Registration Act*, 1875, to be registered as the proprietor of the trade-mark in respect of classes 6, 7, 12, 13 and 49, and that such an application was still pending, and the Plaintiffs had from the date of such application been aware thereof, but they had never alleged any objection to such registration, but

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had acquiesced in such application. The Plaintiffs in their reply alleged that they had opposed the application made on the part of Messrs. *Schmidt* in 1876, and in consequence of their opposition the application was abandoned.

On the 15th of August, 1885, Messrs. *Schmidt* made a fresh application to register their trade-mark *de novo* in respect of the same five classes, and they obtained registration in classes 6 and 49, but were refused in classes 7, 12, and 13, in consequence of a notice of opposition which the Plaintiffs had filed on the 19th of November, 1885.

The Messrs. *Schmidt* then, on the 14th of December, 1885, took out a summons under the *Trade Marks Act*, 1883, asking that the Comptroller-General might be directed to proceed with their application, and to place them on the register in classes 7, 12, and 13, notwithstanding the opposition of the Plaintiffs.

In support of this application the Messrs. *Schmidt* filed a number of affidavits, and the Plaintiffs having applied for leave to cross-examine the deponents, certain of them were selected by arrangement for this purpose; and the summons was adjourned into Court so that it might come on with the action.

Before the hearing the Plaintiffs withdrew their notice of opposition, except as regarded certain articles in classes 12 and 13, viz., axes, coopers' drawing knives, matchets, augers, sheep shears, and garden shears.

In the view which the Court took of the evidence the circumstances attending the first application for registration made by Messrs. *Schmidt* were shortly as follows.

Messrs. *Schmidt* having been exhibitors at the Exhibition of 1851, had since that time largely sold goods in *England*, and down to a recent period members of the firm had travelled twice a year in this country to get orders. For the last seven years they had employed the Defendant *Napper* as their agent; and they had published two illustrated catalogues, one in 1860 and the other in January, 1876; and on both of these books the square and compasses were put forth on the first page as their trade-mark.

In 1875 they employed a society called the *Trade Marks Protection Society* to obtain registration of this trade-mark, and on

the 24th of March, 1876, an application was sent in through that society for the registration thereof. On the 3rd of February, 1877, that application was advertised in the *Trade Marks Journal*. There appeared to have been some delay occasioned by the state of business in the office. A copy of the *Trade Marks Journal* was sent to Mr. *Schmidt*, who gave evidence upon the hearing. Both in his affidavit and on his cross-examination he stated that he was under the impression that the sending to him of the *Trade Marks Journal* was an announcement to him that the registration was complete. It was contended on behalf of the Plaintiffs that he ought not to have been under that impression, but Mr. Justice *Stirling* considered that although a very acute man reading the *Trade Marks Journal* might not have been so misled, the evidence of Mr. *Schmidt*, which had been given with the utmost straightforwardness, was trustworthy, and shewed that he was in fact led into the belief, and did believe, that his trade-mark had been registered. From that time he took no further steps in respect to the registration, and went on until the institution of this action, selling his goods as before, and in the belief that he was registered as the owner of the mark.

What really took place, however, was this. On the 9th of March, 1877, the law clerk of the *Cutlers' Company*, on their behalf, sent to the Registrar of Trade-marks a notice in pursuance of the *Trade Marks Registration Act*, 1875, to this effect: "You are requested to take notice that the trade-mark No. 4252, being a square and compass, in respect of which trade-mark an application for registration has been made by *Johannes Schmidt* on behalf of self and partners, *Peter Ludwig Schmidt* and *Emanuel Schmidt*, trading as *Peter Ludwig Schmidt, Elberfield, Germany*, manufacturers of iron and steel, which application is advertised in the *Trade Marks Journal*, No. 60, of the 3rd of February, 1877, on page 295, is nearly identical with the mark which was on the 27th day of November, 1795, assigned by the master, wardens, searchers, and assistants of the Company of Cutlers in *Hallamshire* to *James Courthwaite* as a maker of files, and the master, wardens, searchers, and assistants do not appear to have dealt with such mark since the last mentioned date. I am directed to mention that the mark is a Freemason's emblem,

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and has been in use since the year 1717. As to the *Cutlers' Company* the mark granted by them will apply as to classes 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 21, 22, 49, and 50, and duplicate representations of the mark accompany each class." On the 26th of April, 1877, the Registrar of Trade-marks sent a letter addressed to Messrs. *P. L. Schmidt*, care of *Trade Marks Protection Society*, to this effect: "Adverting to your application numbered as above and advertised in No. 60 (pages 294 and 295 of the *Trade Marks Journal*), I have to inform you that a notice of objection, a copy of which is enclosed herewith, has been received from the *Cutlers' Company* of *Sheffield*, and I have further to say that in accordance with sect. 9 of the *Trade Marks Registration Act*, 1875, the Registrar cannot proceed to register your mark No. 4252 in classes 6, 7, 12, 13, and 49, until you have obtained the leave of the Court that he should so proceed." That letter from the Trade-marks Registry and the notice by the *Cutlers' Company* were never forwarded to Mr. *Schmidt*, and he knew nothing whatever about them. The matter then dropped, and no further step was taken until the action had been brought, when Messrs. *Schmidt* made their second application by the summons of the 14th of December, 1885, above mentioned. The summons was opposed by Messrs. *Jackson*, the Plaintiffs in this action, and adjourned into Court. The action and the adjourned summons now came on together, and the summons was dealt with first. During the opening of the case for the Applicants Messrs. *Schmidt*, their counsel proposed to read three affidavits which had been filed on their behalf since the date of the order under which the summons was adjourned into Court, and the counsel for Messrs. *Jackson & Co.* objected to such affidavits being used.

STIRLING, J.:—

The rule is that matters are not to be adjourned to the Judge or into Court until the whole evidence is complete, and it is extremely convenient that this rule should be adhered to. In future I shall not allow it to be departed from, but in this instance I shall allow these affidavits to be put in with liberty to the Respondents to cross-examine the deponents.

The case then proceeded, the affidavits, including these, were read, and the deponents were cross-examined. The nature of the evidence, which was treated as admitted for the purpose of the action also, will sufficiently appear in the judgment of the Court.

W. Pearson, Q.C., *Moulton*, Q.C., and *R. F. Norton*, for the Applicants:—

Messrs. *Schmidt* are entitled to proceed with the application of 1876. The Act of 1875, which was in force at the time that application was made, contains no provisions with respect to an application which is not proceeded with up to complete registration. The 63rd section of the *Trade Marks Act* of 1883 provides that "where registration of a trade-mark has not been or shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, the application shall be deemed to be abandoned." But that section is not retrospective, and sect. 113 of the same Act saves any application pending at the commencement of that Act. But even if sect. 63 is retrospective, the omission to proceed with Messrs. *Schmidt's* first application was an accident entirely due to the neglect of the *Trade Marks Protection Society*, who acted as their agents and undertook to carry out all the necessary proceedings, but did nothing further than to advertise the application in the *Trade Marks Journal*, which advertisement Messrs. *Schmidt*, being foreigners, took to mean that their mark had been duly registered. This omission of their agents was not a discontinuance upon the merits. It was no "default on the part of the applicants" amounting to an abandonment on their part. It was at most allowing judgment to go by default, which would be no estoppel as against Messrs. *Schmidt*: *In re Wood's Trademark* (1); *Edwards* v. *Dennis* (2). Moreover, the letter of the Registrar ought to have been sent to Messrs. *Schmidt* at the address given in their application, and not to the *Trade Marks Society*, for the Registrar was not justified in treating the society as principals in the matter, or in recognising their agency.

The 3rd section of the *Trade Marks Act* of 1875, and the 76th

(1) 32 Ch. D. 247. (2) 30 Ch. D. 454.

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section of the Act of 1883 are similar in character, and provide in effect that the registration of a person as proprietor of a trade-mark shall, after the expiration of five years, be conclusive evidence of his right to the exclusive use of such trade-mark; and it is said that the fact that Messrs. *Jackson & Co.* have been on the register for five years is a bar to the application of Messrs. *Schmidt*. But this is not so. Having regard to the "three marks rule," viz., that old marks may be registered by different persons up to the number of three, the word "exclusive" in the last-mentioned sections must be interpreted as capable of being used by three different sets of persons, and therefore as meaning "exclusive," not of one another, but of the general public, and therefore the fact of *Jackson* being on the register is no bar to *Schmidt*: *Re Jelley, Son & Jones' Application* (1); *White Rose Trade-mark* (2); *Mathers* v. *Green* (3); *In re Lyndon's Trade-mark* (4).

Then upon the evidence user in *England* before the 13th of August, 1875, has been proved with respect to all the articles as to which there is opposition; and lastly, the Maltese cross in the Respondents' trade-mark is quite a sufficient distinction between the two.

Hastings, Q.C., and *Hatfield Green*, for the Respondents, Messrs. *Jackson*:—

The 63rd section of the Act of 1883 is retrospective in its operation, and the application of 1876 must be treated as an abandoned application within that section. This is not the case of a withdrawal of a claim in such a manner as to entitle the applicant to renew it at a future time, but an absolute abandonment such as to preclude renewal. Messrs. *Schmidt* are bound by the acts of their agents, and cannot be heard to say that they believed themselves on the register: *In re Hudson's Trade-marks* (5). The application of 1883 is therefore a new application, and should be refused under sect. 72 of the Act of 1883 upon the ground that the new mark sought to be registered is so like one

(1) 51 L. J. (Ch.) 639.
(2) 30 Ch. D. 505.
(3) Law Rep. 1 Ch. 29.
(4) 32 Ch. D. 109.
(5) 32 Ch. D. 311.

already on the register as to be calculated to deceive: *In re Rösing's Application* (1); *Orr-Ewing* v. *Johnston & Co.* (2). But even if it is an old mark (which the abandonment of their first application prevents them from alleging) it cannot be admitted to registration in the face of sect. 3 of the Act of 1875 and sect. 76 of the Act of 1883, under which Messrs. *Jackson* have acquired an exclusive use. Lastly, there is no sufficient evidence of user of the mark, and the articles on which it was alleged to have been used were only sent to *England* for exportation.

W. Pearson, in reply, referred to *In re Hayward's Trade-marks* (3) and *Mouson & Co.* v. *Boehm* (4).

STIRLING, J.:—

The objection to registration having been withdrawn except in respect of the six classes of goods to which I shall advert presently, the question is, can I allow either of the two applications which have been made by Messrs. *Schmidt*, to proceed? In the first place, I will deal with that made in 1876. The main objection to that being proceeded with is founded on sect. 63 of the *Trade Marks Acts* of 1883, which is to this effect: "Where registration of a trade-mark has not been or shall not be completed within twelve months from the date of the application, by reason of default on the part of the applicant, the application shall be deemed to be abandoned." It was at first suggested that that section was not retrospective, but I think that was not really insisted on in the end, and it appears to me plain that the section is retrospective. It applies where registration of a trade-mark has not been completed, evidently referring to a mark as to which an application for registration was pending at the time of the passing of the Act. It was also suggested that sect. 113 prevented the application of that section to a case like the present; but when that clause is looked at it appears to me that it does not have that effect. Sect. 113 says, "The enactments described in the third schedule to this Act are hereby repealed" (that includes the Act of 1875). "But this repeal of enactments shall not—(a) affect the past opera-

(1) 54 L. J. (Ch.) 975.
(2) 13 Ch. D. 434.
(3) 54 L. J. (Ch.) 1003.
(4) 26 Ch. D. 398.

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tion of any of those enactments, or any patent or copyright or right to use a trade-mark granted or acquired, or application pending, or appointment made, or compensation granted, or order or direction made or given, or right, privilege, obligation, or liability acquired, accrued, or incurred, or anything duly done or suffered under or by any of those enactments before or at the commencement of this Act." It was contended that that saved the former application. But all that that section does is to say that the repeal of the enactments is not to affect the application pending or the rights acquired, and it does not say that the provisions in the other parts of the Act are not to affect them; and there being a section, namely, sect. 63, which to my mind has a clear retrospective effect, it appears to me that that must be held to affect the application pending, if it was pending, and to govern it. That view, I find, has been taken by Mr. Justice *Kay* in the case of *In re Hayward's Trade-marks* (1), which was referred to in the latter part of the argument. That being so, I have to deal with sect. 63, and the argument upon that section was that there was no default on the part of the Applicant, and that the section only applies to a case of non-completion of registration by reason of default on the part of the Applicant. I think that is so, and it is necessary, therefore, to consider whether the Applicant, Mr. *Schmidt*, was in default.

In the first place it was attempted to treat this question as if the notice given by the *Cutlers' Company* had been a notice of opposition within sect. 16 of the Rules set out in the first edition of Mr. *Sebastian's* book, which I shall treat for this purpose as the Rules governing the former application, though in point of fact I believe there were variations in them from time to time, but I am not aware that there is anything which is materially different, or would affect the decision in this case.

Now, according to those Rules, after a notice of opposition is given, within three weeks after the receipt of such notice, or such further time as the Registrar may allow, the applicant may send to the Registrar a counter-statement of the grounds upon which he relies for his application; and if he does not do so shall be deemed to have withdrawn his application; and it was

(1) 54 L. J. (Ch.) 1003.

contended that the first application must be deemed to have been withdrawn. But I do not think that is the true view of the case, and I do not think that the notice given by the *Cutlers' Company* was a notice of opposition within that rule. I think that is quite clear when one refers to sect 9 of the Act of 1875, which has special provisions as to the marks assigned by the master, wardens, searchers, and assistants of the *Cutlers' Company*. That section implies an obligation on that company to deliver to the Registrar copies of their corporate marks, and it provides, amongst other things, that when any person applies for registration under the Act of 1875 of a trade-mark "as belonging to any goods or class of goods specified in sect. 2 of the *Cutlers' Company's Act* of 1860, notice of such application, with a copy of such trade-mark, shall . . . be delivered to the *Cutlers' Company*," and such trade-mark shall not be registered until after the expiration of the prescribed period from the giving of such notice. Then sub-sect. 4 provides that "the Registrar under this Act, without the special leave of the Court, to be given only in cases where the Applicant proves his right, shall not, in respect of any goods or classes of goods, with respect to which a *Sheffield* corporate mark shall have been assigned and actually used, and of such mark a copy or description or notice of the assigning whereof shall have been delivered or given to the Registrar as aforesaid, register a trade-mark identical with such *Sheffield* corporate mark, or so nearly resembling the same as to be calculated to deceive." And at p. 235 of Mr. *Sebastian's* book, 1st edit., will be found the Rules for carrying these enactments into effect. It is provided that the manner in which notice of an application to register a new mark shall be given to the *Cutlers' Company* is by sending a copy of the official journal, that is the *Trade Marks Journal*, to the company, who then have a certain time within which they can call the attention of the Registrar to the existence of a similar mark. Then the Registrar, if he finds that notice is given, must send the parties to the Court in order to proceed with the registration. That, it seems to me, was what was done on this occasion, and accordingly in the letter of the Registrar of Trade-marks he expressly refers to sect. 9 of the *Trade Marks Registration Act*, 1875, and tells the applicants he cannot proceed

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until he obtains the leave of the Court that he shall so proceed. It seems to me that, in substance, was a letter from the Registrar of Trade-marks requiring the Applicants to apply to the Court for leave to proceed with the registration. That was not complied with, and no application to the Court was made. Was there then a default on the part of the Applicants on this account? The first point which one has to consider is this: The letter is addressed to Mr. *Schmidt*, but not at the address which he had given in the form of application which he sent in to the Registrar of Trade-marks, which was signed by him and supported by the statutory declaration in accordance with the Rules. But it is sent to him to the care of the *Trade Marks Protection Society*, and it is contended that that was an unauthorized act on the part of the Registrar of Trade-marks, and that it was his duty to send the letter to Mr. *Schmidt* at the address which he had given on the form of application which he sent in.

That contention is based in great measure upon this—that the Rules under the Act of 1875, set out in Mr. *Sebastian's* book, do not contain any provisions enabling a person applying for registration of a trade-mark to appoint an agent, whereas the new Rules under the Act of 1883 contain an express provision for that purpose. It is suggested that the Registrar of Trade-marks could not recognise an agent on behalf of an applicant. I cannot agree with that contention. It appears to me, in the first place, to be founded on a wrong view of the law. I take it that, subject to certain well-known exceptions, every person who is *sui juris* has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right. If it is necessary to refer to any authority in support of that, I may refer to the very recent case of *In re Whitley* before the Court of Appeal (1) with reference to signing a memorandum under the *Companies Act* of 1862, in which the Court held that the signature might be by an agent. And I understand the law to be that, in order to make out that a right conferred by statute is to be exercised personally, and not by an agent, you must find something in the Act, either by way of express enactment or necessary

(1) 32 Ch. D. 337.

implication, which limits the common law right of any person who is *sui juris* to appoint an agent to act on his behalf. Of course the Legislature may do so, but, *primâ facie*, when there is nothing said about it a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose. I have looked carefully through the old Rules under the Act of 1875, which are to be read as part of the Act, and I find nothing to take away that right. It is true that the new Rules contain express provisions on the subject, but there may have been a very good reason for this. These Rules fall into the hands of persons not acquainted with legal doctrines, and it may have been thought advisable on the part of the framers of the Rules that the right to appoint an agent should expressly appear. Then I think upon the evidence it is quite clear that Mr. *Schmidt* appointed the *Trade Marks Protection Society* his agents for all purposes of the registration, and that they had full authority to act on his behalf. It is true that apparently Mr. *Schmidt* afterwards intervened himself, but it was only at the suggestion of the *Trade Marks Protection Society*, in order to expedite the matter, and I do not think he ever took it out of their hands. Therefore, seeing that they had that full power to act on his behalf, I think they had full power to give their own address as that to which notices were to be sent, and I have no doubt they did so, and that the Registrar acted in accordance with their instructions. It appears to me, therefore, that that notice was properly given, and that, as between Mr. *Schmidt* and the Registrar, Mr. *Schmidt* must be taken to have authorized this address to be given and so far to be in default.

But another point is raised. It is said that there is no time limited by the Rules within which the applicant is to proceed, and that it was open to him down to the time when the Act of 1883 came into operation, to go to the Court and obtain leave to proceed, and so that he never was in default. It is quite true there is no time limited for making application to the Court, but neither is there with reference to a great many other things. For example, the Registrar may under rule 8, if he is dissatisfied with the representation of the trade-mark, require a fresh representation before he proceeds to the registration of the trade-

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mark. There is no time limited there, yet I think that if a reasonable time and opportunity were given to the applicant to furnish a fresh representation, and after that he failed to do so, he would be in default within the meaning of this section. Thus I think here, Mr. *Schmidt* having failed to take the proper steps within a reasonable time (for he made no application down to 1885), is in default within the meaning of the section, and although he knew nothing about it, still, having a fully authorized agent in this country to proceed on his behalf, he must take the consequence of his default. I come to the conclusion that the application ought to be deemed to have been abandoned. There is, however, one point which has occurred to me, and which I do not think was brought before me, viz., whether upon the true construction of that section the expiration of the period of twelve months is not the moment at which you are to ascertain whether there is default or not. If that were the true construction of the section, then at the expiration of the twelve months the Applicants were not in default, for the application was originally made on the 28th of March, 1876, and they could not be said to have been in default for some time after the 26th of April, 1877, when their agents must be taken to have received the Registrar's letter. However, that was not put before me by the very able and ingenious counsel who argued the case, and it does not appear to have occurred to Mr. Justice *Kay* in the case before him, where he took the same view as to default as I do. Therefore I think it is possible that on further argument or further consideration that doubt could be removed, and as at present advised I hold that the Applicants are not entitled to proceed with the old application in 1876.

Then comes the question, what is the effect of that? The Act says that the application is to be deemed to have been abandoned, but in my judgment that does not prevent a fresh application being made. The matter has not been completed: the application has never been dealt with on its merits. If it had been, and had been refused, I apprehend that the matter would be *res judicata*, and it would not have been competent for the Applicants to come forward and make a fresh application for the same mark. Here it is merely "deemed to be abandoned," and this seems to

me to mean only that the Applicants must begin afresh if they desire to take any further steps in the matter. Of course there might be cases in which it would not be right to allow him to begin afresh, or at all events where they would be stopped at a very early period, because things might have taken place, and the position of the parties might have been changed in such a way as to preclude them from bringing forward or proceeding with a fresh application. But, upon the evidence before me, I cannot come to the conclusion that any such change has taken place. It is suggested that Messrs. *Jackson* may have entered into contracts on the faith of being sole owners of this mark, and so have prejudiced themselves. But both of them were examined before me, and they do not say that they were put in any such position, and the delay in making the application is to my mind perfectly explained. There is no such laches as to prevent Mr. *Schmidt* from making a fresh application for registration, and I hold that under the circumstances of this case it is perfectly competent for him now to do so.

Then it is said that the 3rd section of the Act of 1875 and the 76th section of the Act of 1883 preclude the Court from entertaining such an application. [His Lordship then read those sections, and continued:—] Now the Act of 1883 is better framed, no doubt, than the Act of 1875. The words of sect. 3 of the latter Act were very difficult to deal with, but they have been the subject of decisions, the effect of which is thus stated in the judgment of Lord Justice *Cotton* in *Edwards* v. *Dennis* (1). Dealing with this 3rd section, he says: "It appears to me that the 3rd section is intended to afford assistance to a person who is bringing an action against another person for passing off his goods as the goods of the person who brings the action. In such a case, if the plaintiff shews that he has been on the register for five years, that dispenses with the necessity of his adducing evidence of exclusive user of his trade-mark. But the 3rd section is no bar to an application under the 5th section for rectification of the register; and in the case of such an application the Court is bound to consider—as the Court of Appeal held in *In re Palmer's Application* (2)—whether the trade-mark

(1) 30 Ch. D. 454, 472. (2) 21 Ch. D. 47.

STIRLING, J. 1886 JACKSON & CO. v. NAPPER. *In re* SCHMIDT'S TRADE-MARK.

is properly on the register, for, though it may have been on for five years, if it ought not to have been on at all, then it can be taken off. So that, on the question whether a trade-mark is properly on the register, the 3rd section is no bar to an application to rectify the register." The other members of the Court of Appeal give similar judgments. There the question was whether the registered trade-mark was properly on the register, and they held that sect. 3 was no bar to that question being raised. Here the question is, not whether the trade-mark of Messrs. *Jackson* was properly on the register, but whether Messrs. *Schmidt* have not a right to be put on that register. I think that the same principle applies, and that as sect. 3 was no bar to an application to rectify the register by removing a trade-mark which had got improperly on, so neither is it a bar to the right to registration of a person who makes out a title to be put on the register. It seems to me that in effect the decisions have brought sect. 3 of the Act of 1875 to be interpreted in exactly the same way as sect. 76 of the Act of 1883, which is more cautiously framed, and says "the registration . . . shall after the expiration of five years . . . be conclusive evidence of his right to the exclusive use of the trade-mark, subject to the provisions of this Act."

Now among the provisions of the Act of 1883 are two which appear to me to be in point. One is sect. 62, which enables persons who have a right to a trade-mark to make an application to the Comptroller to have the mark registered; and the other is sect. 90, which is similar to sect. 5 of the old Act of 1875, but in wider terms, and which enables the Court, on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under the Act, to make an order for making, among other things, an entry as the Court thinks fit. Mr. *Schmidt* being, as I hold, under no disability to bring forward this application by reason of any conduct on his part, appears to me not to be barred either by sect. 3 of the Act of 1875 or by sect. 76 of the Act of 1883 from proceeding under sect. 62 or sect. 90 of the latter Act.

Then the question now reduces itself to what he is to be registered in respect of; and as to the greater part of the matters

included in his application the opposition has been abandoned, but there still remain six classes of goods in respect of which the opposition continues; and I have now to deal with these. The opposition in respect of them is founded on this, that it is alleged that there was no user of the mark in *England* in respect of those classes of goods prior to the 13th of August, 1875, the date at which the line is drawn between old and new marks, the application of Mr. *Schmidt* being for registration of his mark as an old mark. It is said, and I think rightly, that in order to entitle you to register, there being a similar mark already on the register, you must make out that there was a user of the mark in *England* before that date. Now the first class of goods in respect of which the objection is raised consists of axes. The evidence stands in this way. There is general evidence by Mr. *Schmidt* and by a number of persons as to the sale of various classes of goods in *England*, but when Mr. *Schmidt* is cross-examined he is asked to specify instances in which he has sold axes in *England*; and then begins a difficulty. He says, "I have sold hatchets." He is then asked to specify, not hatchets but axes, and the question arises, what is the difference between an axe and a hatchet. Mr. *Schmidt* says that according to his notion the difference between an axe and a hatchet is this, that an axe has got the edge bevelled on both sides: a hatchet has it bevelled only on one; and he says that according to that definition he did not send many axes to *England*. He did send some, he says, which were ordered under the name of hatchets, but which were not of a shape commonly to be found in *England*, and were intended for exportation. But, as I understand it, he sent plenty of hatchets in the sense in which he understands the word. The Respondents' witnesses do not take quite that view of the difference between an axe and a hatchet, and I could not make out exactly from them what their view of the difference was. They said there was a little difference in the size, as I understand, and a little difference in the shape; but can it be, that a man having made goods of a particular shape and a particular size, which might be designated as small axes —which in fact is the definition given in *Johnson's Dictionary* of a hatchet—is to be precluded from putting his mark upon things of the same description or belonging to the same class of goods,

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but of a different size and a different shape? The objection of course is founded on *Edwards* v. *Dennis* (1), in which it was held that a man having registered a mark for iron goods and having manufactured, I think, sheet-iron, and applied his mark to that, was not entitled to stop another man from using the same mark in respect of iron wire which he had never used at all. That to my mind is a totally different thing from saying that a man who has used a mark on hatchets of a particular size and shape is not to be entitled to use a trade-mark as applied to an axe, which is a thing of the same kind but a little different in size and a little different in shape. No doubt at first the classes of goods under the *Trade Marks Act* were drawn too wide, and that has led to difficulty, but if I were to accede to this notion and say that because a man had merely manufactured small axes, he was not to be allowed to register in respect of axes, the logical consequence would be that he would have to register the shapes and sizes of everything to which he attached his mark. That was an inconvenience that was never intended to be imposed on an applicant, and I hold that a man who has manufactured and applied his mark to small axes is entitled to register it in respect of axes generally.

The case as to the other five classes of goods rests on different considerations, and raises the question what is meant by the user of a trade-mark in *England*. Now, in considering that, I do not think I can do better than refer to what Lord *Westbury* said in *McAndrew* v. *Bassett* (2) with respect to the essential ingredients of a trade-mark. He says (3): "An element of the right to the property in a trade-mark may be represented as being the fact of the article being in the market as a vendible article, with that stamp or trade-mark, at the time when the defendants imitate it. The essential ingredients for constituting an infringement of that right probably would be found to be no other than these: first, that the mark has been applied by the plaintiffs properly (that is to say), that they have not copied any other person's mark, and that the mark does not involve any false representation; secondly, that the article so marked is actually a vendible article

(1) 30 Ch. D. 454. (2) 4 D. J. & S. 380.
(3) 4 D. J. & S. 384.

in the market; and, thirdly, that the defendants, knowing that to be so, have imitated the mark for the purpose of passing in the market other articles of a similar description." It seems to me, according to that passage from Lord *Westbury's* judgment, that the trade-mark has been used in *England* if you find that the articles marked with it have been actually vendible articles in the market in *England;* and that is the test which I proceed to apply to the various classes of goods which remain. [His Lordship then proceeded to apply this test to matchets, coopers' drawing knives, augers, and garden shears, as to all of which he held that user in this country had been proved; not so as to sheep shears, there being no evidence to satisfy his mind of any real actual user of the mark in *England*; he therefore held that Messrs. *Schmidt* were entitled to be registered as to all the above-mentioned kinds of goods except sheep shears, but that this exception ought not to affect the costs of the application, which must be paid by Messrs. *Jackson*. His Lordship then proceeded to dispose of the action, and held that Messrs. *Schmidt's* mark so nearly resembled the mark of the Plaintiff as to be calculated to deceive, supposing Messrs. *Schmidt* had no right to use it. So far as regarded sheep shears, therefore, there was nothing to preclude the Plaintiffs from enforcing their rights. *Napper* had acted as the Defendant's agent, and had offered for sale sheep shears marked with that mark. Accordingly the injunction claimed by the Plaintiffs would be granted as regarded sheep shears; but as regarded the rest of the action it had failed and must be dismissed. There would, however, be no order as to costs.]

Solicitors for the Applicants: *Ellis, Munday, & Bartrum.*

Solicitors for Messrs. *Jackson & Co.: Cattarns, Jehu, & Hughes,* agents for *Younge, Wilson, & Co., Sheffield.*

W. W. K.

STIRLING, J.

1887

Jan. 11.

WANKLYN *v.* WILSON.

[1886 W. 2984.]

Practice—Action for Account—Account rendered—Payment into Court before Trial—Interlocutory Application.

Upon an interlocutory application for the payment of money into Court made before the trial of an action for the taking of an account, where an account has been rendered, and the Court has before it the parties to the account and evidence as to the items in dispute between them, the Court will look into the facts of the case, and if in the fair exercise of its judicial discretion it can arrive at a conclusion that a sum will be due to the Plaintiff on the taking of the account, and what the amount of that sum will be, the Court will order the Defendant to pay that amount into Court.

Motion.

On the 25th of January, 1872, *J. Wanklyn*, the husband of the Plaintiff, entered into an agreement in writing with the Defendant *Wilson* for the purchase for £3000 of one half share of certain property near *Rome*, of which the Defendant was then the owner. *J. Wanklyn* paid £1000, part of the purchase-money, on or before the execution of the agreement, and the balance of £2000 in November following, and the Defendant agreed when called upon to execute the necessary deeds.

No conveyance was executed. The property remained vested in the Defendant upon trust for himself and *J. Wanklyn* in equal moieties, and *J. Wanklyn* died in April, 1873, having, by his will dated in March, 1873, bequeathed his share in the property to the Plaintiff, and appointed her his executrix.

The property consisted of the *Frascati Casino and Gardens*, near *Rome*, and the Defendant, who had all along managed it, continued to do so, rendering accounts of the concern, which was not a profitable one, to a Mr. *Ruck*, who was the Plaintiff's agent, and who paid the Defendant the balance which appeared from time to time to be due from the Plaintiff.

In 1886 it was resolved that the property should be sold, and the Defendant, who was in *Italy* for the purpose of effecting the sale, after some negotiation ultimately succeeded in selling it. Previous to the sale correspondence took place between the

Defendant and Mr. *Ruck*, in the course of which Mr. *Ruck*, as the Plaintiff's agent, wrote to the Defendant on the 2nd of February, 1886, that the Plaintiff agreed to a sale of the property for £6000, and that out of this sum 10 per cent. should be paid in full of all commission and charges, without any inquiries being made as to how it was expended. Shortly after the receipt of this letter the Defendant sold the property for £6000, and the whole of the purchase-money was paid to him by the end of March, 1886, £4000 in cash and the rest in bills, which he discounted shortly afterwards. No further correspondence took place until the 17th of May, 1886, when Mr. *Ruck* wrote to the Defendant asking for detailed information as to the sale and the purchase-money, and not being able to obtain this, the Plaintiff ultimately brought this action and claimed an account of the moneys which had arisen from the sale, payment to her of an equal moiety thereof after making all proper deductions, and a receiver.

On the 6th of October the solicitor of the Defendant wrote to the solicitor of the Plaintiff a letter in which he stated the amount of the purchase-money, that it was paid in cash and bills, but that it was subject to commission, expenses, and charges of various kinds, including the personal expenses, and law costs incurred by the Defendant, and his remuneration for trouble and loss of time, and that some of the disbursements were at that time unascertained.

The Plaintiff then gave notice of motion for the appointment of an interim receiver of all money payable in respect of the purchase of the property, and for an order that the Defendant might hand over to the receiver all bills and securities held by him for the purchase-money and pay into Court a moiety of any purchase-moneys received by him.

Affidavits were filed on both sides, and the Defendant was cross-examined. He disputed the Plaintiff's claim, and as part of his evidence he tendered an account in which he claimed to deduct from the purchase-money various sums of money, including £2000 which he alleged he had paid away for commission; £137 10*s.* (item 6) being a charge of five guineas a day for a visit he made to *Rome* in 1883; sums for travelling and other expenses for himself

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and his son in connection with the same and another visit to *Rome* (items 7 to 11); a sum of £845 5*s.* (item 12) being a charge of five guineas a day during the whole period of his stay in *Rome* in 1886, from the 5th of January to the end of June, viz., 176 days, less fifteen days not specifically employed in the business; and a sum of £500 (item 15) for his personal trouble in undertaking the management of the property from 1872 to 1886. The result of this account was to bring out a balance due from the Plaintiff to the Defendant.

The Plaintiff then moved that the Defendant should be ordered to pay into Court one moiety of the purchase-money received by him, subject only to such deductions as he was properly entitled to make having regard to the contract between the parties.

W. Pearson, Q.C., and *F. A. Lewin*, in support of the motion.

Hastings, Q.C., and *Dibdin*, for the Defendant:—

The Court will not upon an interlocutory application order a party to pay money into Court when the amount is in dispute, however great the probability may be that it will appear upon the taking of the account that a balance is due. It will not try the question of amount in dispute. To do so, would be to forestall the trial of the action. At the utmost the Court will, upon such an application, only order payment in subject to such deductions as the accounting party claims to make, that is, of the amount not in dispute: *London Syndicate* v. *Lord* (1); *Freeman* v. *Cox* (2).

[STIRLING, J. referred to *Hampden* v. *Wallis* (3); and *Dunn* v. *Campbell* (4).]

W. Pearson, in reply:—

No payment beyond 10 per cent. can be allowed in respect of commission, for that was the contract between the parties. In *Dunn* v. *Campbell* it was decided that upon an interlocutory application for payment into Court upon an account rendered the

(1) 8 Ch. D. 84.
(2) Ibid. 148.
(3) 27 Ch. D. 251.
(4) Ibid. 254, n.

Court will determine whether deductions claimed are proper to be made. Payment in was similarly directed by the Court of Appeal in *Porrett* v. *White* (1), where *Freeman* v. *Cox* (2) was approved. The Defendant is a trustee, and he claims to make deductions in respect of money paid away and retained in breach of trust.

STIRLING, J.:—

This is an application by the Plaintiff in the action for payment into Court of a sum which is alleged to be due from the Defendant to the Plaintiff. It is made on motion and before the trial of the action, and the first question which I have to consider is what are the circumstances, having regard to the present practice of the Court, under which such an order will be made. The case of *London Syndicate* v. *Lord* (3), to which I have been referred on behalf of the Defendant, goes very fully into that. It is a decision of the Court of Appeal, and of course is binding upon me. In that case after a decree to take the accounts of a partnership the Chief Clerk directed that two accountants, one of whom was employed by the plaintiff and the other by the defendant in investigating the accounts for the purposes of the suit, should report on the accounts, shewing what items were undisputed and what were disputed, and verify their report by affidavit. The accountants verified an account, shewing £541 due from the defendant to the plaintiff on the undisputed items; and it was held that the £541 ought to be ordered into Court, for that, although no certificate had been made, the fact that £541 at least was due from the defendant was ascertained with sufficient certainty to entitle the plaintiff to have it ordered into Court.

The Master of the Rolls (Sir *George Jessel*) in his judgment dealt with the first question in this way; he said (4): "Under those circumstances, has it been sufficiently ascertained, is there a sufficient probability, that the account will result in a balance of £541 at least being found due from Mr. *Lord* to the plaintiff, to authorize the Court to act upon that view?" and then he said

(1) 31 Ch. D. 52.
(2) 8 Ch. D. 148.
(3) 8 Ch. D. 84.
(4) Ibid. 88, 89.

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that he thought the question must be answered in the affirmative. Then, after going through the facts, he said this: "On principle, I should say that now, when we no longer have a delegated Judge to take the accounts, but the Judge himself who decides the case takes the account in Chambers, with the assistance of the Chief Clerks, if the Judge finds from the evidence brought before him that a certain amount, and probably much more, will be found due from the defendant, but that by reason of unavoidable delay in ascertaining how much will be due no certificate can be made, and no final decision as to the ultimate balance of the account arrived at, he has power to say, 'I am satisfied now that this amount, at all events, has been sufficiently ascertained, and I will order the defendant to pay it into Court as security.' It appears to me that on principle there can be no objection to such an order. The very object of litigation is to secure the fruits of that litigation to the successful party, and nothing can more conduce to attaining that object than taking security from the person who must ultimately pay at least the amount for which security is given. Therefore, whether we look at the principle on which all practice should be founded, or whether we look at the principle to be deduced from the reported cases, I think we must arrive at the conclusion that the Court can, in the fair exercise of its judicial discretion, order a sum to be paid into Court when it has been sufficiently ascertained to be due on the taking of the accounts." Then the other members of the Court of Appeal (Lords Justices *Baggallay* and *Thesiger*) concurred in that view.

Now the cases do not stop there. Another case came before the late Master of the Rolls, namely, *Dunn* v. *Campbell* (1), which unfortunately is not reported otherwise than in a note to a subsequent case of *Hampden* v. *Wallis* (2). It is stated in the note that *Dunn* v. *Campbell* was a partnership action, in which it was found by arbitration that the defendant was entitled to £16,000, and in the account of the partnership dealings furnished by the defendant before action brought, he made himself out as a creditor for £6000, this result being arrived at by crediting himself with

(1) 27 Ch. D. 254, n. (2) 27 Ch. D. 251, 257.

the £16,000. The plaintiff, however, alleged that as between himself and the defendant the arbitration was *ultrà vires*, and the late Master of the Rolls, adopting this view, deducted the £16,000 from the defendant's account, and turned the balance against him so as to make him a debtor to the extent of £10,200, which he was thereupon ordered to bring into Court.

Mr. Justice *Chitty*, in giving judgment in *Hampden* v. *Wallis* (1) said, "In *Dunn* v. *Campbell* (2), which was a partnership action, . . . the late Master of the Rolls went as far as this—he looked at the account, and for the purposes of the motion rejected certain items, and turned the balance against *Campbell*, and ordered him to pay in £10,200," and then he said that there was some appeal against the order, but that nothing came of it. In *Hampden* v. *Wallis* the learned Judge made a similar order, based upon *Dunn* v. *Campbell*; and then, finally, the last case which appears to have been decided upon the point is *Porrett* v. *White* (3), which was before the Court of Appeal. There the plaintiff and defendant were the trustees of a settlement, and the defendant, in letters written to the plaintiff before the commencement of the action, which was for the administration of the trusts, admitted having received part of the trust funds and invested the sum in an unauthorized way. The plaintiff took out a summons to have the money brought into Court, and made an affidavit deposing that he had paid the money to the defendant, and stating the admissions contained in the letters. The defendant did not answer the affidavit or adduce any evidence, and the Court of Appeal, affirming an order of Mr. Justice *Chitty*, held that there was a sufficient admission that the money was in the defendant's hands to justify an order for payment of it into Court.

Upon these authorities it seems to me that the Court is now at liberty, when it has before it the parties to an account, to look at the account and the facts of the case, and, to use the words of the late Master of the Rolls, "in the fair exercise of its judicial discretion," to order a sum of money to be paid into Court when it has been sufficiently ascertained that such a sum will be due on

(1) 27 Ch. D. 251. (2) 27 Ch. D. 254, n.
(3) 31 Ch. D. 52.

STIRLING, J. 1887 WANKLYN v. WILSON.

the taking of the account. Adopting that principle, I have to look at the facts of this case, and in the fair exercise of my judicial discretion I have to consider whether I can arrive at any conclusion as to what sum will be due to the Plaintiff in the taking of the account which is the object of the action, having regard to the account which has been actually rendered by the Defendant in the action; and I am also to bear in mind that the object of the whole proceeding is, again quoting the words of the late Master of the Rolls (1), "to secure the fruits of that litigation to the successful party, and nothing can more conduce to attaining that object than taking security from the person who must ultimately pay at least the amount for which security is given." Now what are the facts of this case? [His Lordship then stated the facts of the case, and went in detail through the account, dealing with the various items seriatim. With reference to the claim of £2000 for commission, he held, that having only authority to sell at £6000 subject to a 10 per cent. commission, the Defendant must bring into account one moiety of the difference between £2000 and 10 per cent. on the £6000. Looking to the way in which the Defendant had conducted himself, and with the view of giving some security to the Plaintiff that this litigation might not be entirely fruitless, and seeing that there was no justification whatever for the charge of this large amount, his Lordship held that the Defendant ought to pay into Court the sum of £700 in the first instance. His Lordship then disallowed items 6 to 11, on the ground that the Defendant had no authority to make the charges comprised therein; and as to item 12, the sum of £845 5*s*., he only allowed the Defendant his expenses down to the 31st of March, 1886, when the purchase was completed, and after disallowing the £500 as being simply a lump sum put in by him at the last moment to turn the balance the other way and prevent the Court from making an order against him, his Lordship continued:—] It seems to me that in this case there is not a dispute within the meaning of the judgment of the late Master of the Rolls in *London Syndicate* v. *Lord* (2), and that I shall be acting in accordance with the spirit of that

(1) 8 Ch. D. 90. (2) 8 Ch. D. 84.

decision, and of the decision of the same learned Judge in *Dunn* v. *Campbell* (1), if I reject the claim of the Defendant and order him, upon the application of this Plaintiff, whom he has kept in the dark and has defied so long, to pay into Court within a month the sum of £700 charged for additional commission, the sums mentioned in the items numbered 6 to 11 both inclusive, the sum in item No. 12 reduced by the amount I have mentioned, as also the sum of £500, item 15.

Solicitors for Plaintiffs: *Cunliffes & Davenport.*
Solicitor for Defendant: *Russell Cooke.*

(1) 27 Ch. D. 254, n.

W. W. K.

KEKEWICH, J.

1887

Feb. 19.

STONE *v.* SMITH.

[1886 S. 1883.]

Specific Performance—Defendant not appearing at Trial—Judgment—Practice.

In a vendor's action to enforce a contract to purchase leaseholds, the Defendant by his statement of defence admitted that he was unwilling to complete the contract, and did not appear at the trial:—

Held, that the Plaintiff was not entitled to immediate judgment rescinding the contract and forfeiting the deposit, but only to the usual judgment for specific performance.

THE Defendant, by letter dated the 5th of May, 1885, offered to purchase the leasehold house of the Plaintiff for £775, the purchase to be completed on the 31st of May, 1885, and his offer was accepted in writing the same day. There were no stipulations or conditions in the letters, but the Defendant, on his offer being accepted, paid the Plaintiff £75 as a deposit and in part payment of the purchase-money. The title was investigated and accepted, and the conveyance engrossed for execution, but the Defendant neglected to complete, and on the 11th of May, 1886, the Plaintiff commenced this action claiming specific performance of the contract, and the usual account with costs. The Defendant by his defence pleaded the *Statute of Frauds*, and traversed the other allegations in the claim, but admitted that "he was unwilling to carry the contract into effect." Issue was joined, and this was the trial of the action. The Defendant did not appear. The Plaintiff proved the contract.

Russell Roberts, for the Plaintiff:—

The Plaintiff is entitled to the usual judgment for specific performance, but that will be of no advantage to him now. The Defendant is insolvent, the property is leasehold and daily depreciating in value, and if the usual decree is worked out the Plaintiff will be a heavy loser. Under the circumstances it is submitted that the Plaintiff is entitled to immediate judgment cancelling the contract and forfeiting the deposit.

[KEKEWICH, J.:—Is there any rule of Court that a vendor plaintiff in an action for specific performance is entitled to such a judgment at the trial?]

I admit that such relief is usually obtained on further consideration; but here the Defendant says he is unwilling to complete; he, in fact, repudiates the contract. There is no authority for this particular case. At Common Law, where one party to a contract gives notice that he does not intend to perform it, the other can at once rescind: *Danube and Black Sea Railway Company* v. *Xenos* (1); *Chitty* on Contracts (2); *Fry* on Specific Performance (3); and there is now no difference between law and equity in expounding contracts: *In re Terry and White's Contract* (4). The Plaintiff is, therefore, entitled to accept the Defendant's abandonment of the contract and to rescind at once. He is also entitled to forfeit the deposit: *Howe* v. *Smith* (5).

KEKEWICH, J.:—

This case is somewhat peculiar. It is an action for specific performance by a vendor against a purchaser. The contract is contained in two letters which have been proved. The Plaintiff in his statement of claim sets out the contract, and alleges delivery of the abstract, acceptance of the title, approval of the draft conveyance, and the Defendant's default in not completing, and he asks for the usual decree for specific performance, and damages and costs. The Defendant by his statement of defence admits that he is unwilling to fulfil the contract, and does not appear at the trial. That being so, rule 31 of Order XXXVI. applies; and the Plaintiff having proved his claim, so far as the burden of proof lies upon him, is entitled to such relief as is claimed by his statement of claim, and to such other relief as is incidental thereto. The Plaintiff is, therefore, entitled to specific performance, but he now says: "I do not want that. The Defendant has repudiated the contract, and I ask for rescission and forfeiture of the deposit," and the point I have to decide is whether the Plaintiff is entitled to such a decree in the absence

(1) 11 C. B. (N.S.) 152, 176.
(2) 7th Ed. p. 643.
(3) 2nd Ed. pp. 458, 478.
(4) 32 Ch. D. 14, 20.
(5) 27 Ch. D. 89.

KEKEWICH, J. 1887 STONE v. SMITH.

of the Defendant and on these pleadings. Now the cases cited all go to this, that when one party to a contract says he is unwilling to fulfil the contract, the other is entitled to rescind; but they are all cases relating to commercial contracts, and cannot, I think, be applied to a case dealing with real estate, and where one of the parties has come to the Court to enforce the contract. I must assume that the purchaser, though not appearing, may be waiting to hear the result of this trial and is looking out for means to fulfil the contract. To turn round upon him now and serve him with judgment for rescission and forfeiture of his deposit might be very unjust to him. It seems to me that if a Plaintiff claims such relief he must plead it clearly, and prove his right to it at the trial. In my opinion, therefore, the Plaintiff is now only entitled to the usual decree for specific performance, which is what he claims, with the usual directions. There will be a delaration of lien for unpaid purchase-money and liberty to apply.

Solicitors: *Chapple, Welch, & Chapple.*

H. L. F.

NORTH CENTRAL WAGON COMPANY *v.* MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY.

C. A. 1886 *Dec.* 1, 2, 3, 4, 6, 15. 1887 *Feb.* 22, 24.

[1885 N. 520.]

Bill of Sale—Invoice and Receipt—Documents not constituting an Assurance of Chattels—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 4 [*Revised Ed. Statutes, vol. xviii., p.* 652]—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Railway Wagons—Hiring Agreement—"Tolls"—Lien of Railway Company—Railways Clauses Consolidation Act*, 1845 [*Revised Ed. Statutes, vol. ix., pp.* 704, 730], *ss.* 3, 97.

In order that an inventory of goods with receipt attached, or a receipt for purchase-money of goods, may be a bill of sale within the meaning of sect. 4 of the *Bills of Sale Act*, 1878, it must amount to an assurance of the chattels at law or in equity.

Woodgate v. *Godfrey* (1) and *Marsden* v. *Meadows* (2) approved.

Cochrane v. *Matthews* (3), *Ex parte Odell* (4), and *Ex parte Cooper* (5) distinguished.

The *B.* company, which was a colliery company, being in want of money, applied for assistance to the Plaintiffs, who were a wagon company. After some negotiations the Plaintiffs gave the *B.* company cheques for £1000, and the *B.* company sent the Plaintiffs an invoice for 100 wagons. At the same time an agreement was signed by the representatives of the two companies that the Plaintiffs should let the 100 wagons to the *B.* company for three years at a rent payable quarterly, the total rent for the three years amounting to £1000, with interest at 7 per cent. The agreement contained a clause empowering the Plaintiffs to seize the wagons and put an end to the agreement in case the rent should be in arrear for seven days: and an option for the *B.* company to purchase the wagons at a nominal price at the end of the term. The next day the *B.* company sent the Plaintiffs receipts for the £1000. The rent being in arrear, the Plaintiffs seized most of the wagons, but nine of them were detained by the Defendants, who were a railway company on whose line they were standing, on the ground that they had a lien on them for tolls.

An action having been brought by the Plaintiffs against the last-mentioned railway company for recovery of the nine wagons, the Defendants disputed the title of the Plaintiffs on the ground that the invoice and receipts constituted a bill of sale under the *Bills of Sale Acts*, which was void as a bill of sale, not being registered or in accordance with the scheduled form in the Act of 1882, sect. 9; and they also claimed a lien for tolls on the wagons:—

Held (reversing the decision of *Bacon*, V.C.), that there was a complete

(1) 5 Ex. D. 24.
(2) 7 Q. B. D. 80.
(3) 10 Ch. D. 80, n.
(4) 10 Ch. D. 76.
(5) 10 Ch. D. 313.

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contract between the Plaintiffs and the *B.* company for purchase and sale of the wagons, under which the Plaintiffs had a good title to the wagons, independently of the invoice and receipts: and therefore those documents did not constitute a bill of sale within the meaning of the Acts.

Under the first part of sect. 97 of the *Railways Clauses Consolidation Act*, 1845, which provides that on failure "to pay the tolls due in respect of any carriage or goods," the company may detain and sell "such carriage, or all or any part of such goods," the company has no right to detain and sell a carriage for default in payment of tolls due only in respect of the goods carried on it.

By an Act with which the *Railways Clauses Consolidation Act* was incorporated, a railway company was authorized to charge a certain rate per ton per mile for coal carried on its line, with additional rates per ton per mile if the company supplied carriages and engines, but no mention was made of a toll for carriages conveyed on their line. The *B.* company conveyed coals on the line in their own carriages, the railway company supplying power, and rendering accounts by which they charged the authorized rates per ton per mile for the coals and power, but did not charge any toll for the carriages:—

Held (reversing the judgment of *Bacon*, V.C.), that the railway company could not detain and sell the carriages for the tolls due.

Semble, that the latter part of the section, which enables the company to detain and sell for tolls due to them any carriages or goods on the premises of the company belonging to the persons owing the tolls, is not confined to carriages or goods to which the debtor is absolutely entitled, but if he has only a partial interest the company can only sell such interest as he has.

Whether under the latter part of the section carriages can be detained and sold for tolls due on goods, *quære*.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (1).

The action was brought by the *North Central Wagon Company* against the *Manchester, Sheffield, and Lincolnshire Railway Company* to recover certain wagons which the Defendants had detained on the ground that they had a lien on them under the 97th section of the *Railways Clauses Act*, 1845. The facts are fully set forth in the previous report; and the following short statement will be sufficient for the purpose of this report.

In the month of February, 1884, the *Blacker Main Colliery Company*, being in want of money, applied for assistance to the Plaintiffs. A correspondence took place between the companies, from which it appeared that £1000, being the amount required by the *Blacker Company*, was proposed to be found by the Plaintiff company buying 100 railway wagons from the *Blacker Company* for £1000 and letting them to the *Blacker Company* at a certain

(1) 32 Ch. D. 477.

rent. When the amount of purchase-money and the wagons to be purchased had been agreed on, a meeting was held on the 18th of February, 1884, at which Mr. *Ball* attended on behalf of the Plaintiff company, and Mr. *Malleson* and Mr. *Wallack* on behalf of the *Blacker Company*, and an agreement was then signed whereby the Plaintiff company agreed to let and the *Blacker Company* agreed to hire 100 railway wagons for three years certain from the 1st March, 1884, at a rent of £372 10*s.* payable quarterly, the total rent for the three years amounting to the sum of £1000, with interest thereon at 7 per cent. per annum. By this agreement the Plaintiff company were authorized, in case of a quarter's rent being in arrear for seven days, to seize the wagons and put an end to the agreement: and option was given to the *Blacker Company* to purchase the wagons at the end of the term at a nominal price.

On the same day two cheques were signed by the Plaintiff company, one for £257, payable to the *Sheffield Wagon Company*, who were the original owners of the wagons, and who still retained a charge on them; and the other for £743, payable to the *Blacker Company*, making together the sum of £1000.

On the following day these cheques were posted to the respective companies, and an invoice was sent by the *Blacker Company* to the Plaintiffs in the following terms:—

"Messrs.

"The *North Central Wagon Company, Rotherham.*

"Dr.

"To the *Blacker Main Colliery Coy.*

"1884. Feb. 18.	To 100 wagons, Nos. 1–100, and having *Sheffield Wagon Company's* plates No. 8675 to 8774, and marked 'The *Blacker Main Coy. Barnsley*'	£1000 0 0

"Cr.

"Feb. 19.	By cheque payable to *Sheffield Wagon Co.*	257 0 0
		£743 0 0"

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On the 20th of February the *Sheffield Wagon Company* and the *Blacker Company* sent receipts of that date for the £257 and the £743 to the Plaintiff company.

The name-plates of the *Sheffield Wagon Company* were then removed from the wagons, and those of the *North Central Wagon Company* substituted, and those name-plates, together with the name-plates of the *Blacker Company*, remained till the commencement of the present action.

The colliery of the *Blacker Company* was connected by a siding with the railway of the Defendants, and after the above arrangement the *Blacker Company* sent coal over the railway in the wagons comprised in the agreement.

In February, 1885, the *Blacker Company* being in difficulties called a meeting of their creditors; and on the 19th of March, two quarters' rent being then due from the *Blacker Company* to the Plaintiff company, Mr. *Ball*, the secretary of the Plaintiff company, sent the *Blacker Company* a formal notice that unless £186 5*s.* was paid by the 23rd of March, the Plaintiff company would take possession of the wagons and put an end to the agreement.

The money not being paid the Plaintiff company seized such of the wagons as were in the control of the *Blacker Company*, but were unable to seize nine of the wagons which were standing on the Defendants' line. The Plaintiffs' secretary thereupon wrote to the manager of the Defendant company demanding possession of the wagons as being the property of the Plaintiffs. The Defendants refused to give them up, claiming a lien upon them for £237 7*s.* 10*d.* which they alleged to be due to them in respect of tolls.

The special Act (*South Yorkshire and River Dun Company's Act*, 1864, 27 & 28 Vict. c. lxxvii.) under which the Defendants carried on their undertaking, specified by clause 13, "the rates, tolls or charges" which they were entitled to demand and receive "in respect of the use of the railway," the last clause being, "for all coal, culm and charcoal the sum of five-eighths of a penny per ton per mile for the use of the railway; and if conveyed in wagons or trucks provided by the company an additional sum per ton per mile not exceeding a farthing, and if drawn or

propelled by engines or other power provided by the company an additional sum per ton per mile not exceeding two-eighths of a penny."

The Defendants rendered to the *Blacker Company* monthly accounts of their charges against that company, each of which was headed, "For carriage of coal and coke as under," and then, in separate columns, were the date of consignment of each load, the place of departure, the place of destination, the number of the wagon, the weight of the load, the rate per ton, and the total sum chargeable for the load. No charge was expressed to be made in respect of the wagons. The £237 7*s.* 10*d.* was made up from the above accounts, and was not confined to coal conveyed by the nine wagons in question, but included all sums claimed by the Defendants to be due to them from the *Blacker Company* for tolls.

The Defendants insisting on their lien, the Plaintiffs, on the 19th of May, 1885, commenced this action against them to recover possession of the nine wagons and damages for their detention. After the commencement of the action the Defendants sent to the Plaintiffs an account for £25 11*s.* confined to tolls for coal carried in the nine wagons, but not confined to tolls accrued since the wagons last came into the possession of the railway company.

At the trial of the action the Vice-Chancellor dismissed the action on the grounds (1) that the transaction carried out by the agreement was in substance a loan, and that the agreement, receipts and invoice constituted a "bill of sale" within the meaning of the *Bills of Sale Act* (1878) *Amendment Act*, 1882; and that as those documents were not registered, and were not in the form prescribed by sect. 9, the transaction was void, and the wagons were not the property of the Plaintiffs; and (2), that the sum due from the *Blacker Company* to the Defendants for the use of the railway and the supply of locomotive power, constituted "tolls" for which the Defendants were entitled to a lien under sect. 97 of the *Railways Clauses Act*.

From this judgment the Plaintiffs appealed.

The question whether the nine wagons were the property of the Plaintiffs was first argued.

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Rigby, Q.C., and *Phipson Beale*, for the Appellants:—

There was no bill of sale requiring registration in this case. The legal effect of the transaction between the parties was a bargain and sale at common law independently of any documents; and that sale was complete before the agreement for hire: *Marsden* v. *Meadows* (1). *Ex parte Odell* (2) was treated in the Court below as an authority applicable to this case. But there the position of debtor and creditor existed from first to last, and there was good reason for holding that the two documents together constituted a security. That is not the case here. In this case the agreement was not a borrowing of money but a *bonâ fide* letting or hiring of stock: *Yorkshire Railway Wagon Company* v. *Maclure* (3); *Ex parte Crawcour* (4). The *Bills of Sale Act*, 1878, s. 4, includes inventories with receipts attached and receipts for purchase-money of goods: but those words are to be read in connection with the following words "and other assurances of personal chattels." The documents here did not constitute an assurance, for the sale was complete independently of them. At all events, these documents did not constitute a bill of sale under the Acts, for they were not given as a security for money to be paid by the grantor. [They also referred to *Field* v. *Newport Railway Company* (5).]

Henn Collins, Q.C., and *C. A. Russell*, for the Defendants:—

There was no independent sale of the wagons apart from the documents, namely, the agreement of the 18th of February, 1884, the invoice, and the receipts. When these documents are looked at they constitute an assurance of the wagons by way of security for money. It is, therefore, within the meaning of the *Bills of Sale Acts*.

The oral evidence shews that the parties treated the transaction as one of borrowing, and the conduct of the parties can be taken into account: *Alderson* v. *White* (6). The decision in *Yorkshire Railway Wagon Company* v. *Maclure* (7) was a decision

(1) 7 Q. B. D. 80.
(2) 10 Ch. D. 76.
(3) 21 Ch. D. 309.
(4) 9 Ch. D. 419.
(5) 3 H. & N. 409.
(6) 2 De G. & J. 97.
(7) 19 Ch. D. 478; 21 Ch. D. 309.

on the facts, and the facts here do not give rise to the same inference as there: the intention here was a loan. The fact that the wagon company had no power to lend does not establish that the transaction was not a loan.

[COTTON, L.J.:—Do you say that if a secretary enters into a contract which is *ultrà vires* his company, and the company makes by deed an arrangement which is *intrà vires*, the former vitiates the latter?]

We say that a company's setting its seal to a deed proceeding on the footing of purchase cannot make a contract for sale when neither party intended it. If a company having power to borrow borrowed from a company which had no power to lend, it could not on that account repudiate the debt: it received the money as a loan and is bound to repay, though the case might possibly be different if the lending company declared at the time that it had no power to lend. The 9th section of the Act of 1882 invalidates an inventory with receipt for money attached, by virtue of sect. 3, which incorporates sect. 4 of the Act of 1878.

[FRY, L.J.:—If you import the words "inventory with receipt for money attached" into sect. 9, must they not be given as security for money to make the section apply to them?]

If it is shewn by parol evidence that the parties were contracting for a loan, that is enough to satisfy the condition. The section does not apply solely to assurances. An inventory with receipt for money attached is not an assurance of chattels; it does not by its own force give a title to them; it is only evidence of title. The Legislature, treating the subject with knowledge of that, cannot be supposed to have intended to confine its enactments to documents conferring a title, it must have intended to hit all documents which could be used as evidence of title: *Ex parte Odell* (1); *Ex parte Cooper* (2); *Cochrane* v. *Matthews* (3).

[BOWEN, L.J.:—The statute invalidates the bill of sale, not the transaction. Any title independent of the bill of sale is not taken away.]

The judgment of Lord Justice *Brett* in *Marsden* v. *Meadows* (4)

(1) 10 Ch. D. 76.
(2) Ibid. 313.
(3) 10 Ch. D. 80, n.
(4) 7 Q. B. D. 80.

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supports our argument: he treats every document which can be used as evidence of title as struck at by the Act.

[FRY, L.J.:—Have we not to consider whether the 9th section proceeds on the definition in sect. 4 or on that definition as modified by sect. 3?]

Ex parte Hubbard (1) and *Marsden* v. *Meadows* (2) have remarks bearing on the point.

Rigby, in reply:—

I say, first, there was no bill of sale. The documents, except the hiring agreement, furnish evidence, but no one of them is a step in the title. If they are put in the fire we are no worse off. The hiring agreements and the name-plates shew our title. But apart from this, the transaction aimed at by sect. 9 is a transaction to secure the payment of money by the grantor. Here the relation of paying money to the grantor did not exist. I do not contend that the transactions hit at by the statute are only those of the nature mentioned in the schedule, for the words of the Act are wide, and *Ex parte Close* (3) shews that they are not to be thus confined.

[FRY, L.J.:—Is a receipt for the price of goods ever an assurance?]

No; but the Act meant to hit at documents which might practically do duty as a bill of sale.

[FRY, L.J.:—If not an assurance, what is the effect of avoiding it?]

It might in many cases be the only available evidence, so that setting it aside would defeat the transaction. Nobody could say that this hiring agreement is a bill of sale within the Act: it is attempted to make out that it is part of a bill of sale made up of several documents. I say it is not. If there is a bill of sale, who is the grantor? The Respondents say we derive title from the *Sheffield Wagon Company*. If so they are the grantors, and there is no pretence for saying that any money was secured to them.

[FRY, L.J.:—The words "and other assurances" in the Act of

(1) 17 Q. B. D. 690. (2) 7 Q. B. D. 80.
(3) 14 Q. B. D. 386.

1878, sect. 4, follow "receipts for the purchase-money of goods." It seems that the Legislature intended to get rid of the question in *Ex parte Odell* (1) and *Byerley* v. *Prevost* (2). Do not the documents here amount together to an assurance?]

No; they do not together constitute an assurance or proof of title. No case has gone the length of piecing together several documents which are not contemporaneous, and saying that they together form an assurance.

1886. Dec. 15. COTTON, L.J.:—

This is an action brought by the *North Central Wagon Company* against the *Manchester, Sheffield, and Lincolnshire Railway Company* in consequence of the detention of certain wagons on which they claim a lien under the 97th section of the *Railways Clauses Consolidation Act*, 1845, for tolls which they allege are due to them; and the question we have now to decide is whether the Defendant company have succeeded in shewing that the Plaintiff company had no title at all to the wagons.

The mode in which the Defendants seek to defeat the title of the Plaintiffs is this. They say that there were in this case documents which amounted to a bill of sale under the Acts of 1878 and 1882, and that these documents not being in accordance with the provisions of one of the Acts were void, and that therefore the title of the Plaintiffs was altogether avoided. They rely on the 9th section of the Act of 1882, which is as follows:—"A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." Undoubtedly the documents which are said to constitute a bill of sale were not in accordance with that form. There are two questions to be considered: first, whether there is or are any document or documents which can be considered a bill of sale within the Acts; and, secondly, if so, whether they are security for the payment of money by the grantor.

There are three documents here. There was the agreement entered into between the Plaintiffs and the *Blacker Company* for

(1) 10 Ch. D. 76. (2) Law Rep. 6 C. P. 144.

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letting the wagons to the *Blacker Company*; and there are two other documents, an invoice sent by the *Blacker Company* to the Plaintiff company and a receipt given by the *Blacker Company* for the sum of money paid to that company by the Plaintiffs. Of course the hiring and letting agreement cannot in itself be a bill of sale, but it may be looked at to see what the nature of the transaction was as regards the second part of the transaction. It cannot be a bill of sale within the meaning of the 9th section, because it was not to secure the payment of money by the grantor thereof, which was the Plaintiff company. But it was argued that the other two documents constitute a bill of sale.

I think I ought before considering the Act of Parliament to refer to the facts of the present case; and when we look at the parol evidence it appears that shortly before the 18th of February, 1884, there was a negotiation between the Plaintiff company and the *Blacker Company*—which was in fact a private partnership—the *Blacker Company* requiring to raise money; and the Plaintiff company, being a company that made and bought and let out for hire wagons, expressed their willingness to buy certain wagons of the *Blacker Company* for £1000, and then to let them upon a hiring agreement to the *Blacker Company*. The date, which is of the greatest importance upon the evidence as regards the transaction between the *Blacker Company* and the Plaintiffs, was the 18th of February. Before that time the amount of money to be given and the wagons which they were to buy was, as they say, altogether settled, and before that time it was found how much money had to be paid by the *Blacker Company* to the *Sheffield Company*, who had an interest in these wagons, and to whom the *Blacker Company* had to pay a sum of money before they could call the wagons their own. To my mind, though it was not made out very clearly, the *Sheffield Company* must be considered as having the property in these wagons and the *Blacker Company* as having the equitable right to them, or the right to claim them on payment of the sum which was due to the *Sheffield Company*. At all events it is quite clear that the amount was settled before the 18th of February. That being so, before the 18th of February the terms of the hiring and letting agreements were settled between the parties. Then on the 18th of February there was

a meeting between those representing the Plaintiff company and those representing the *Blacker Company*, and the evidence about what took place is the evidence of Mr. *Ball*, the secretary of the Plaintiff company. [His Lordship read the evidence, and continued:—] Now what does that come to? As I understand it, it proves that there was an agreement made between Mr. *Ball* as representing the Plaintiff company, and Mr. *Malleson* and Mr. *Wallack*, on behalf of the *Blacker Company*, on the 18th, and on the same day the directors of the Plaintiff company recognised the agreement as having been made on their behalf by signing the two cheques which were wanted in order to complete the transaction by payment of the £1000, that is to say, £257 to the nominees of the *Blacker Company*, in whom the property was vested, and the remainder, £743, to the *Blacker Company*. If it had stood there alone, in my opinion there would have been a complete contract of purchase and sale as between the *Blacker Company* and the Plaintiff company.

But we must look at the Acts of Parliament to see whether we are right in our construction of them. The Act of 1882 does not give any definition of what a bill of sale is, but it throws us back on the previous Act of 1878, the 4th section of which defines bills of sale as follows: "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels." Here we have a receipt for the purchase-money of goods, though it does not refer to them, and therefore neither that alone nor that with the invoice can be looked upon as a contract for purchase or sale. But, to my mind, the governing words of this section are the words, "and other assurances of personal chattels." It is not that every receipt shall be a bill of sale; but in order to make it a bill of sale the document must be an assurance of personal chattels. There is no doubt about assignments, or transfers, or declarations of trust, because they bind either the legal or equitable rights in the goods, and the only way in which the documents in the present case could be looked upon as a bill of sale would be by treating them as binding the equitable interest which the *Blacker Company* had in

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these goods at the time; or if there was no transaction which effectually bound the two parties, then the matter would stand in a totally different way. Here upon the evidence I think it is made clear that there was a perfect transaction of purchase and sale on the 18th of February independently of and before these two documents, and before the first of the documents was in any way asked for.

We were very much pressed, and properly so, with the decisions of the Court of Appeal in the cases of *Ex parte Odell* (1) and *Ex parte Cooper* (2). Undoubtedly those cases ought to be considered by us. But, as a matter of fact, in both those cases the Judges came to the conclusion that without the documents which they held to be bills of sale, and also bills of sale for the purpose of securing money—I am not dealing with the latter point now—there was no transaction at all. What Lord Justice *James* says in *Ex parte Odell* (3) is this: "The two documents are the true record of the transaction, and they shew by themselves, without any other evidence, that the goods were originally *Walden's* goods, and that they became, either at law or in equity, by means of these two documents, *Cochrane's* goods, as mortgagee, but liable to be redeemed by *Walden*." So that they must have come to the conclusion, in that case, that without the document there was no contract binding these parties, so as to bind the right of *Walden* to the goods, but that these documents alone constituted the transaction. In *Ex parte Cooper* Lord Justice *James* talks of the documents there as being an assurance of the goods; and in the case of *Woodgate* v. *Godfrey* (4), which came before the Court upon argument to make a rule *nisi* absolute, *Brett*, L.J., said that (5) "when the order *nisi* in this case was moved, Lord Justice *Thesiger* was present, and he stated that in *Ex parte Cooper* the Court considered that there was but one transaction, and that without the receipt and inventory there would have been no sale." *Jessel*, M.R., in giving judgment, begins thus (6): "The difficulty in this case is occasioned by the decision in *Ex parte Cooper*; it is not easy to discover

(1) 10 Ch. D. 76.
(2) Ibid. 313.
(3) Ibid. 85.
(4) 5 Ex. D. 24.
(5) Ibid. 25.
(6) Ibid. 26.

the principle upon which the judgment proceeded; but we have had the benefit of some remarks made by Lord Justice *Thesiger* as to that case, and those remarks shew that the decision may be explained upon an intelligible principle. That principle is, that independently of the document there was no sale of the goods, that there was one transaction constituted by the inventory and the receipt thereto attached, and that if there had been no document there would have been no transaction." That clearly shews what the view of the Master of the Rolls was as to *Ex parte Cooper* (1), assisted as he was in that view by the explanation given by Lord Justice *Thesiger*, who was one of the Judges who decided *Ex parte Cooper*.

Having gone through those two cases which were most relied on as against the view we take in this case, we may refer, in confirmation of the view we take, to the case of *Woodgate* v. *Godfrey* (2), which shews that where there is a perfect transaction without the documents, those documents cannot be considered as bills of sale within the meaning of the Acts; and that is pretty evident, because if there is a title independently of the bill of sale, when all that the Act does is to declare that the bill of sale is void, that cannot vitiate or put an end to a title perfected before the bill of sale came into existence at all. That is strongly supported by the view which was taken in *Woodgate* v. *Godfrey* by the then Court of Appeal, but which was also taken in the case of *Marsden* v. *Meadows* (3) by the Court of Appeal, where Lord Justice *Bramwell* says: "I think that the proper interpretation of this enactment is that when the receipt is intended to be the instrument of transfer or a record of the transaction, then it is to be registered and attested as a bill of sale under the Act; but that where there is no evidence of any intention of that kind, it shall be unnecessary to register a receipt signed by the seller of the goods." I gave the leading judgment in that case and I do not refer to my own judgment, but I still hold the same opinion, that where, on the evidence, as in this case, there is a complete contract independently of, and previous to, the documents, and the documents cannot be looked upon as a memorandum of the

(1) 10 Ch. D. 313. (2) 5 Ex. D. 24.
(3) 7 Q. B. D. 86.

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agreement, in the sense that they are a record of the transaction, they cannot be, within the fair construction of those words, "other assurances," bills of sale, so as to require registration or to require to be in the form required by the Act of 1882.

Therefore, in my opinion, although we are differing from Vice-Chancellor *Bacon*, we ought to hold that in this case the Defendants have not succeeded in displacing the title of the Plaintiffs to these wagons, and the first question which has been argued, namely, whether there is a bill of sale within the meaning of the Acts, in my opinion must be answered in favour of the Plaintiffs; and it is not necessary to enter into the question whether, if there had been a bill of sale, it could have been considered as being given by way of security for payment of money by the *Blacker Company*. In my opinion we must now, having held that the Plaintiffs have a title to the goods, hear the further argument of the Respondents upon the question whether the railway company have a right to retain these goods. The difference between the parties on that matter is very small, and if they can settle the matter without having that question argued, of course it will be well for them to do so, now that they know our opinion as to the title to these wagons. But, of course, if the matter is not settled it must be put in our paper again for argument, and for us to decide what ought to be the amount for which our judgment is to be given.

BOWEN, L.J.:—

The question we have to determine is, whether these wagons at the date of the seizure by the railway company were the property of the *North Central Wagon Company*. The wagons had belonged to the *Blacker Main Colliery Company* or to the *Sheffield Wagon Company*, or to both; and on or about the 18th of February they became, unless the transaction is to be considered as null and void, the property of the *North Central Wagon Company*.

The case for the Respondents, the railway company, is, and must be, that these wagons only became the *North Central Wagon Company's* property in virtue of documents, which taken together are, or some one or more of which is, a bill of sale; because they

require, in order to put an end to the rights of the *North Central Wagon Company*, to shew that those rights depend exclusively upon a document which is avoided by the 9th section of the *Bills of Sale Act* (1878) *Amendment Act*, 1882. The 9th section of the *Bills of Sale Act* of 1882 only avoids bills of sale made or given by way of security for the payment of money by the grantor which is not in accordance with the form in the schedule. The railway company therefore have to establish, in order to succeed, first, that the title of the *North Central Wagon Company* depends upon some document; and secondly, that the document is one which is avoided by this Act. Lastly, like all the preceding *Bills of Sale Acts*, it is to be remarked that the Act does not avoid transactions; it does not avoid parol agreements; it does not avoid anything except documents which are defined by the interpretation clause of the Act of 1854 in the first place, and subsequently by the interpretation clause of the Act of 1878. But if, independently of a document, the rights of the parties have been effectively altered or dealt with either in law or in equity, avoiding the document can produce no result—it cannot operate to the disadvantage of that which stands *proprio vigore* independently of the document; and if, on the true investigation of the evidence in this case it is clear that the *North Central Wagon Company* have rights which do not depend upon any bill of sale, it really becomes unnecessary to consider whether there is any bill of sale or not.

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I am not going to examine the evidence again, which the Lord Justice has examined at length; but I will confine myself, so far as the facts of this case are concerned, to saying that I agree with him in thinking that the rights of the *North Central Wagon Company* do not depend either at law or in equity upon the invoice or the receipt, and that, therefore, they stand outside documents altogether until you come to the agreement of demise.

Still it would not be satisfactory, I think, to leave the case upon that statement, without considering generally what authorities there are upon these *Bills of Sale Acts*, with the view of determining whether there is in this case a bill of sale at all; because the two questions so mix themselves up in reasoning, that I propose to go farther than to say merely that the transaction

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stands independent of documents altogether, and to consider whether there is a bill of sale in this case which can be avoided.

I think that in this case there is no bill of sale. The invoice and the receipt do not, either by themselves or taken together with the agreement, become a document in writing which has the effect in law or in equity of an assurance; and it seems to me that where there is no assurance there is no bill of sale, unless the document is one which falls (and it is not contended in this case it does) under the subsequent words in the interpretation clause of the Act of 1878, which refers to licenses to take possession. The Act of 1882 is to be read with the Act of 1878. The Act of 1882, though avoiding bills of sale for the security of money, gives no definition of the term "bill of sale," but throws us back for the definition upon the interpretation clause of the Act of 1878, which interpretation clause of the Act of 1878 is, with an addition which it will be material to examine, a reproduction of the interpretation clause of the Act of 1854. In considering the interpretation clauses of the Act of 1854 and of the Act of 1878 I will drop aside altogether, because they do not touch this case, those particular words which bring within the scope and ambit of the legislation "powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt" and confine myself to the earlier words in the interpretation clause under which this bill of sale falls, if it falls anywhere within the Act.

The object of both the Acts—the Act of 1854 and the Act of 1878—was to prevent fraud upon creditors by secret bills of sale of personal chattels; and the Act of 1854 and the Act of 1878, which followed, only avoided the document and did not avoid, as I said before, the transaction. It only avoided the document against sheriff's officers or assignees in bankruptcy so far as regarded the property comprised in the document, and where there was an apparent possession left in the grantor. The fact that those are the provisions of avoidance—which the Act contains—and that that is the result which the Act is intended to have, throws considerable light, I think, upon the interpretation clause, and justifies one in standing with certainty upon the view which I entertain—that, apart from the later words (which

I set aside for the purpose of what I am going to say), the earlier words only intend to deal with assurances either in law or in equity of personal chattels—documents which *proprio vigore* alter the rights of the parties either in law or in equity as regards the property or as regards the possession. That is really the simple and natural construction of the first interpretation clause. The expression "bill of sale" is to include "bills of sale, assignments, transfers, declaration of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels." The words "other assurances of personal chattels" imply that the previous words must be read with the intendment that only such documents were intended to be struck at, as were, in some sense or other, themselves assurances of personal chattels.

Now there were a number of cases under the Act of 1854, which dealt with receipts. Receipts no doubt were given constantly for the purpose of avoiding the operation of this Act; and the Courts had from time to time to consider how far transactions would fail which were connected with, or in any way dependent upon a written receipt. It seems to me that all, or a great part of the mass of obscurity and of difficulty which is connected with these Acts and with their interpretation, may be explained upon the ground that the Legislature for its own wise purposes had, as I said before, not ventured to strike at transactions, but only at documents; so that if a person could make his transaction complete and effective in law or in equity without the document, the Act could do nothing to affect his rights, and did not purport to do anything to affect his rights. That is a result which it may be said enables people to drive a coach and four through the Act of Parliament; but it is a result which follows from the very way in which the Act is drawn, and perhaps necessarily drawn.

My excuse for going through these cases at some length is, that it seems to me to be convenient now that we have arrived at the present case (which I think will probably be an important one as regards the law) to take a general view of all the authorities upon the subject of these receipts, and to see where we stand.

As far as I know, the first case in which this class of docu-

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ment was dealt with at all after the Act of 1854 was the case of *Phillips* v. *Gibbons* (1). That was a case where there was a document which recited a sale of certain chattels by one person to another. It purported to demise the chattels by the then deed to the vendor at a certain rent payable quarterly, with a proviso entitling the vendee to enter and take possession if the rent were unpaid for ten days after any of the quarterly days of payment. In that case Lord *Campbell* and the Queen's Bench decided that the instrument was a bill of sale which required registration, but they did so on the express ground that there was no evidence of any sale at all except by the instrument in question; and the instrument in question they thought was a mere colourable bill of sale. Lord *Campbell* found as a matter of fact, that there was no transaction at all outside the bill of sale—at least so I read his judgment—and on that ground he thought the bill of sale was a document which was intended to affect the rights of the parties, and if so, it was an assurance, and fell because it was not registered.

The next authority is *Hale* v. *Saloon Omnibus Company* (2). That was a case where a tradesman sold his furniture and stock-in-trade: and the only document in the case which passed was a receipt for the purchase-money. Vice-Chancellor *Kindersley* held that, the transaction being complete without the receipt, the receipt was not a bill of sale, and did not require to be registered.

In the year 1860 came the case of *Thomson* v. *Barrett* (3), a case which has been referred to constantly since. The case arose upon interpleader with respect to property in a barge which had belonged to a man of the name of *Mallett*. *Mallett* had borrowed money from *Thomson*, and applied for a further loan to *Thomson*, which *Thomson* refused without some security. It was then verbally agreed between *Thomson* and *Mallett*, that *Mallett* should sell the barge to *Thomson*, and that the barge, if *Mallett* brought the money, should become his property again, and then it was arranged that *Thomson* should let the barge to *Mallett* at £30 per annum, and a receipt was drawn up for the balance of the purchase-money. The Court held that the receipt was not a bill of sale,

(1) 5 W. R. 527. (2) 4 Drew. 492.

(3) 1 L. T. (N.S.) 268.

and did not require to be registered, on the ground that it was intended only as a receipt for the purchase-money; that it was intended that the property should pass; and that the engagement that, if the money was repaid, the property should revest, was a separate and independent engagement.

Then comes *Allsopp* v. *Day* (1), in which receipts of trustees of a wife's settlement given on payment of purchase-money for the husband's goods and effects were held not to be bills of sale on the ground that they were not an assurance. In that case the present Lord *Penzance*, then Baron *Wilde*, intimated his opinion that a bill of sale under the Act must be some instrument by which property was intended to pass.

Allsopp v. *Day* was followed by *Byerley* v. *Prevost* (2), decided in 1871—a case where household furniture and effects were sold for a past debt by a son to his father, and no money passed. The receipt was drawn up so as to express what was not the truth. It recited that possession was taken, and that money had been received. In fact, no possession was taken, and no money was received. The question of *bona fides* was left to the jury, and they found that the transaction was a *bonâ fide* transaction; and the learned Judge, Mr. Justice *Byles*, reserved for the opinion of the Court the question whether the document was one which required registration or not, and, following *Allsopp* v. *Day*, the Court held that the receipt being a mere receipt did not require registration. *Byerley* v. *Prevost* has been reflected upon in subsequent cases, to which I will refer in a moment. I think the vice in *Byerley* v. *Prevost* was the finding of the jury. It seems to me that the jury flew in the face of the facts. They ought to have found that the transaction was fraudulent, that no property really was intended to pass, and that it was a mere sham. But if you take the finding of the jury that it was a *bonâ fide* transaction, then it seems to me that the Court did nothing more than follow the true principle, there being in that case no document which was an assurance, and the Court carefully guarded themselves in *Byerley* v *Prevost* from saying that they approved of the finding of the jury. Mr. Justice *Montague Smith* says: "Our decision has nothing to do with the merits of the case."

(1) 7 H. & N. 457. (2) Law Rep. 6 C. P. 144.

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Then came *Graham* v. *Wilcockson* (1). In that case there was a sale of chattels by tenants to their landlord under an arrangement by which the purchase-money was to be applied in payment of the rent due, and a memorandum was drawn up in these terms: "We acknowledge that we have this day sold and delivered the above articles and effects for the price above-named, £163 13*s.*, and that payment therefor has been made to us of that amount in account between us, and under the agreement arranged to be made with respect to the amount owing by us to him" (that is the landlord) "for rent, interest, and expenses." The goods were then delivered to the landlord, and then let by him again to the tenants, who remained in possession. Now that certainly was a case in which one might have thought that the memorandum was intended to embody and to affect the rights of the parties; but Baron *Cleasby*, whose authority is very great, considered, following *Byerley* v. *Prevost* (2), that the document was a mere receipt, and that the transaction was one of a sale for valuable consideration which preceded and was independent of the receipt, and that, therefore, the receipt did not require registration.

Now, up to this point, and pausing here for a moment, one cannot help observing that there is a very great bulk of authority, in the Common Law Courts it is true, to the effect that mere receipts are not within the *Bills of Sale Act* if they are not assurances which are intended to affect the rights of the parties, but only meant to be evidence of arrangements made outside the receipt. But then came three cases of very great moment, *Cochrane* v. *Matthews* (3), before Mr. Justice *Lindley*, as he then was, *Ex parte Odell* (4), before Lord Justice *James*, Lord Justice *Baggallay*, and Lord Justice *Thesiger* in this Court, and the case of *Ex parte Cooper* (5), also in this Court, and almost at the same time as *Ex parte Odell*, and before the same Judges who decided *Ex parte Odell;* and in that group of cases, beginning with Lord Justice *Lindley's* decision in *Cochrane* v. *Matthews*, and finishing with *Ex parte Cooper*, a decision of Lord Justice

(1) 46 L. J. (Ex.) 55.
(2) Law Rep. 6 C. P. 144.
(3) 10 Ch. D. 80, n.
(4) Ibid. 76.
(5) 10 Ch. D. 313.

James, Lord Justice *Baggallay*, and Lord Justice *Thesiger*, the Court seems to have been impressed with the danger of allowing the *Bills of Sale Act*—I will not say to be evaded, but—to be escaped by documents which were in the form of receipts, but where the transaction was more complicated than that of an ordinary sale and purchase. Now whether the decisions on the facts are right or wrong in those three cases is a matter which we have not to concern ourselves with, but it seems to me that in all three the *ratio decidendi* is that the documents were to be read together; that when read together the documents were an assurance; and lastly, an implication of fact, which runs I think through the judgments in all three cases, that there was no transaction outside the documents which affected in law or in equity the rights of the parties or amounted to an assurance. It is perfectly true, and one does not desire to disguise the fact, that Lord Justice *James*, Lord Justice *Baggallay*, and Lord Justice *Thesiger*, do not appear to have assented to the conclusion to which the Common Law Courts had come in *Allsopp* v. *Day* (1), and more particularly in *Byerley* v. *Prevost* (2), and, perhaps, also in the other cases which I have mentioned, but they distinguish those cases on the ground that in each of those cases there had been an actual purchase and an actual payment of the purchase-money independent of the receipt—in fact that there had been a transaction outside, the validity of which was not affected by and was not intended to be affected by the receipt. That very reasoning, although one may not concur with the view they had taken of *Allsopp* v. *Day* (and I do not concur with the view they took of that case), seems to me to strengthen the position that a document is only a bill of sale to be avoided under these Acts if it amounts to an assurance. The distinction which they drew as to fact, fortifies the proposition of law which seems to me to be the sound one; and I cannot help thinking that a moment's reflection will shew that this is so, because, supposing in *Cochrane* v. *Matthews* (3), in *Ex parte Odell* (4), and in *Ex parte Cooper* (5) there had been a transaction outside which had a valid effect upon

(1) 7 H. & N. 457.
(2) Law Rep. 6 C. P. 144.
(3) 10 Ch. D. 80, n.
(4) Ibid. 76.
(5) 10 Ch. D. 313.

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the rights of the parties, what good would avoiding the bills of sale have done? The Act of Parliament does not say that with the bill of sale is to tumble down all the transaction connected with it. It only drags down the bill of sale—and the bill of sale only drags down in its ruin things which depend upon it for their validity or legal effect, and therefore it is an essential element in the decisions in *Ex parte Odell* (1) and the group of cases to which I have referred, that the Court in those cases thought there was no valid transaction outside. It is in that very way that *Ex parte Cooper* (2), which is the last, and perhaps the most remarkable, of the decisions, is explained in the next case of *Woodgate* v. *Godfrey* (3), where the then Master of the Rolls (Sir *George Jessel*), Lord Justice *Bramwell*, and the present Master of the Rolls (then Lord Justice *Brett*), reverted, in my opinion, to the older view, and I think the sounder view, and again unmistakably laid down, as it seems to me, the true doctrine, that a document was really not a bill of sale unless it was an assurance. They distinguish *Ex parte Cooper* on the ground that in that case the Court had come to the conclusion that there was no transaction outside the documents. Some of these cases it is true were decided after the passing of the Act of 1878, but they were decisions upon the Act of 1854.

Then came the Act of 1878 with sect. 4, and the Legislature seems to have been struck with the fact that these receipts were often documents which escaped. But the Legislature, or the draftsman, appear to me to have set about mending the hole in the meshes of the law, if it was a hole, in a most inefficacious way; and I think there was really confusion of thought in the mind of the draftsman who framed the Act of 1878. In order, apparently, to sweep receipts into the operation of the law, he puts them into the interpretation clause, where they were not before. But instead of putting them after the word "assurances," he puts them in before the word "assurances," and allows their true interpretation therefore to be coloured by the subsequent words. He provides that bills of sale shall include "bills of sale, assignments, transfers . . . inventories of goods with receipts

(1) 10 Ch. D. 76. (2) 10 Ch. D. 313.
(3) 5 Ex. D. 24.

thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels." Now if a receipt was an assurance of personal chattels, it was struck by the older Act under the general words. If it is not an assurance of personal chattels, it is not struck by this Act. The truth I think is, that the draftsman had in his mind fictitious transactions—where receipts were used to give a colour of assurance—for assurance there was, properly speaking, none, because the document was not intended to have any effect unless the transaction was revealed to the eye of the world—and in his anxiety to bring within the operation of the Act fictitious assurances, he treats them as if they were real assurances. I think that accounts for the introduction of the word "receipts" there. The section, nevertheless, must be construed according to the ordinary way in which we construe Acts of Parliament; and it seems to me that under the Act of 1878 a receipt is no more a bill of sale than it was before unless it amounts to an assurance of personal chattels—for it does not fall within the later words "powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt."

Then we have finally the case of *Marsden* v. *Meadows* (1), where a receipt given on a sale by the sheriff was held not to be a bill of sale, and where Lord Justice *Cotton* gave the leading judgment of the Court, in which *Woodgate* v. *Godfrey* (2) was followed, and I think that, in accord with *Woodgate* v. *Godfrey*, was upheld the chain of common law authorities of which *Woodgate* v. *Godfrey* was the last and perhaps the most authoritative, and the final sanction of this Court was thus given to the doctrine that a document must be an assurance to operate as a bill of sale. By "assurance," I mean not an assurance at law only, but a document which, either in law or in equity, amounts to an assurance. That is really the history of these decisions, and I believe that we have come back to the true view, if ever it was departed from, in emphasising once more the proposition on which the judgment of this Court depends. If it is said, as it may be said, that this view affords an opportunity to many people to evade the *Bills of Sale Act*, I should point out first that it is a view which is not novel, for it

(1) 7 Q. B. D. 80, 83. (2) 5 Ex. D. 24.

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has existed ever since the Act of 1854, and secondly, that is a difficulty which is inherent, as I said before in the case—which arises necessarily from the fact that the Legislature has not put its finger on transactions, but has confined itself to avoiding the documents and the documents only. I agree therefore with the judgment which the Lord Justice has pronounced.

FRY, L.J.:—

Were it not that we are differing from a decision of the learned Vice-Chancellor, I should probably content myself in this case with expressing my concurrence in the elaborate judgments of my learned Brethren, but having regard to the respect I always feel for the Vice-Chancellor's decisions, it is proper that I should add a few words, and state briefly the grounds of my concurrence.

The Vice-Chancellor has determined that the transaction in this case was, in substance, a loan, and that the agreement for hiring, the invoice and the receipts constitute a bill of sale within the meaning of the *Bills of Sale Act* of 1878, which not being in the terms given in the schedule to the Act of 1882, was void. Now, upon the first question, which is one of fact, whether this transaction was in substance a loan, I feel myself unable to agree with the learned Vice-Chancellor. It appears to me, having attended to the arguments for the Respondents, that the true transaction was that which found expression in the instruments themselves, and that the very incapacity of the Plaintiff company to make a loan, coupled with its capacity to enter into a transaction for the purchase of wagons and the leasing of wagons, was a very strong reason why the contracting parties never intended to come to a contract for loan, whereas they intended to come, and in this case did in fact come, to a contract for sale and hire. Again, when the circumstances are carefully examined, it appears impossible to find any evidence of the consent of the contracting parties to any other bargain than that which was truly expressed by the instruments: and therefore this does not appear to me to be a case in which one bargain was really entered into, and another expressed on the face of the instruments, but a case in which the contracting parties never

did contemplate a loan, but did throughout contemplate a sale and hiring, throughout contemplated that very transaction which is expressed in the instruments, and no other. I think, therefore, the transaction was one not for a loan, but as I have said, for sale and hiring.

But then the Respondents say, that even if that be so, the instrument nevertheless required to be within the form contained in the schedule to the Act of 1882: because they observe, and observe with truth, that the 9th section of the Act does not provide for bills of sale only made by way of security for the repayment of money lent, but generally by way of security for the payment of money, and they say whether this be or be not a loan transaction, it was plainly one by which payment of money was secured; and then they say further, that if you look at the 4th section of the Act of 1878, which embodies the definition of a bill of sale, you find among the instruments included in the bill of sale, receipts for purchase-money of goods. They say we have here a receipt for purchase-money of goods, and a transaction which secures the payment of money, and an instrument given by way of security for the payment of money. It appears not necessary to inquire whether the 9th section of the Act is or is not confined to transactions by way of security for the repayment of money lent, because, in my judgment, the argument of the Respondents fails upon the true construction to be given to the words "receipts for the purchase-money of goods" in the 4th section.

Now to ascertain what is the true meaning of those words, I look at the case historically, and I go back to the Act of 1854, which is the first statute of this series of statutes avoiding bills of sale in certain cases; and I find that the expression "bill of sale" in that Act is declared to "include bills of sale, assignments, transfers, declarations of trust without transfer and other assurances of personal chattels;" I leave out the latter words "power of attorney," because no argument has been addressed to us on those words, and I do not see that any argument could be so addressed to us. When, therefore, instruments which were not expressly described in the previous words of the definition I have read came to be decided upon, when such instruments as

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receipts for the purchase of goods or invoices with receipts came before the Court, the inquiry in every case has been, is this instrument or is it not an assurance of personal chattels? By an "assurance of personal chattels," I understand to be included not merely an assurance of the legal property in the personal chattel, but an assurance of any equitable interest in personal chattels; and, therefore, the question is this, is the instrument an assurance of a legal or equitable interest in personal chattels. If not, then the avoiding of the instrument does not avoid any assurance, consequently you have done nothing. The goods have passed notwithstanding you have set aside or rendered inoperative a piece of paper. It is to be observed that the Act of 1854 and all the subsequent Acts are drawn on the same lines. The Legislature was not minded to declare that every transaction by which an interest, legal or equitable, in personal chattels passed should be evidenced in writing, and then should in certain cases be void if not registered, but it contented itself with laying hold of those cases in which there was a written assurance of a legal or equitable interest, and avoiding that assurance in certain cases. Therefore I repeat, pausing on the Act of 1854, both the scope and object of the Act, and the express words of the interpretation clause, shew that a bill of sale, as defined by the words I have read, applied, and applied only, to assurances of chattels. Now, looking at the authorities, I find that in every case the inquiry was, is this instrument or is it not an assurance? It is perhaps needless to call attention to the uniformity with which that question has been asked, but I will just refer to one or two cases to shew that that was plainly the inquiry. In the case of *Cochrane* v. *Matthews* (1), which was before Mr. Justice *Lindley*, as he then was, he states his conclusion in the matter in these terms: "It appears to me that is the true view of the case, that the two documents form one assurance within the meaning of sect. 7 of the Act"—that is, the Act of 1854. In the like manner in the case of *Ex parte Odell* (2), which has been so often referred to, Lord Justice *James* says (3): "Then, if this document—the receipt—in itself was not at law

(1) 10 Ch. D. 80, n. (2) 10 Ch. D. 76.
(3) 10 Ch. D. 84.

sufficient to transfer the property in the goods, it may have been sufficient to shew that the one party was transferring, and the other receiving the goods. But, if it did not pass the property at law, beyond all question, in my view, it was sufficient to confer on the person to whom it was given—*i.e.*, Mr. *Cochrane*—a perfectly good equitable title to the goods, which title he could have enforced in equity if necessary, independently of the statute;" and therefore it is plain that he came to the conclusion that the instrument, there, was, though not an assurance of a legal interest, an assurance of an equitable interest. The same observation may be made of *Ex parte Cooper* (1), where the Court says the instruments constitute a complete assurance; and the same view is expressed in the case of *Woodgate* v. *Godfrey* (2). Therefore I conceive that that was the true question under the Act of 1854.

Now, between the passing of the Act of 1854 and the passing of the Act of 1878 there had been that long series of decisions to which Lord Justice *Bowen* has more expressly referred, upon instruments either inventories or receipts for the purchase-money of goods, and I believe I am correct in stating that in all those cases except the case of *Cochrane* v. *Matthews* (3), which was before Lord Justice *Lindley*, and which was before the passing of the Act of 1878, the inventories or receipts have been held not to be assurances, but in that case Lord Justice *Lindley* had determined that the instrument did constitute an assurance. I leave out of consideration the cases of *Ex parte Odell* (4), *Ex parte Cooper*, and *Woodgate* v. *Godfrey*, because those cases, although they were all decisions on the Act of 1854, were pronounced after the passing, in July, 1878, of the Act of 1878.

That being the state of the authorities, the Legislature was minded to introduce new words into the definition clause. They might have enacted that every receipt should be a bill of sale, though the inconvenience and difficulty created by such an enactment would have been extreme. They might have enacted, on the other hand, that such receipts and such invoices as, following the decision of Lord Justice *Lindley* in *Cochrane* v. *Matthews*,

(1) 10 Ch. D. 313.
(2) 5 Ex. D. 24.
(3) 10 Ch. D. 80, n.
(4) Ibid. 76.

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were assurances should be still deemed to be assurances. They might, in other words, have adopted that decision. It appears to me that that is what they did. They said that a bill of sale should "include bills of sale, assignments, transfers, declarations of trust without transfer" (so far, the words are the words of the Act of 1854), "inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels." That seems to me to be a declaration to this effect, that where the inventory or the receipt is an assurance it shall be within the scope of the Act, and where it is not an assurance it shall not be within the scope of the Act. If it had been the mind of the Legislature to include all inventories and all receipts for the purchase-money of goods, they must have been put outside the words "other assurances." I think, therefore, the Act of 1878 had no wider scope as regards the inventories and receipts, though it is clearer in point of expression, than the Act of 1854.

That being so, there comes the case of *Marsden* v. *Meadows* (1), on the Act of 1878, and, according to my reading of the decision, that adopts the view I have been endeavouring to express. It says the inquiry is, is the instrument an assurance? If it is an assurance, either of legal or equitable interests, it is within the scope of the Act. If it is not, it is not within the scope of the Act.

Therefore, the inquiry in the present case is, are any of the documents—the invoice, the receipt, the hiring agreement, or any other documents—assurances of a legal or equitable interest in personal chattels? I think they are not. The interview of the 18th of February was held for the very purpose of concluding the bargain between the parties. The terms of the bargain had been the subject of previous negotiation. The exact amount of the demand to the *Sheffield* company, as I read the evidence, was known to both the contracting parties in consequence of the letter of the same date which had been received from the *Sheffield Company*. They met for the purpose of concluding the bargain and so completely did they deem the bargain concluded, that on the same day, in the presence of the secretary of the *Blacker*

(1) 7 Q. B. D. 80.

Company, the hiring agreement was executed, which treated the title as if it had been transferred from the *Blacker Company* to the Plaintiff company. That being so, it appears to me that the transaction of the 18th was a complete agreement for the transfer of the whole property in these wagons. It is not till after that interview takes place, till after the matter has been concluded between the contracting parties, that some clerk, writing on behalf of the Plaintiff company, asks to have an invoice made out in the usual form. What the object of the request may have been is immaterial. It was no part of the bargain between the contracting parties that there should be any written evidence of the transaction. It does not appear to me that the contract was in any way conditional on entering into such a bargain, and the request for that invoice, probably merely for the sake of convenience, seems immaterial. I, therefore, answer the question in this way —that there was no assurance here comprised in any of the written instruments, consequently the written instruments were not a bill of sale, and consequently did not require to be in the form provided by the schedule to the Act of 1882. For these reasons I am unable to agree with the decision of the Vice-Chancellor, and unless the parties can agree as to the remaining matters between them, they must apply to us to restore the case to the paper for further hearing.

M. W.

C. A.

The appeal was heard as to the reserved question on the 22nd and 24th of February, 1887.

Rigby, Q.C., and *Phipson Beale*, for the Appellants:—

We say that these are not tolls for which the wagons can be detained. Goods may be carried on the Defendants' railway, either in wagons of the company or wagons of the owners. In the former case the company charge higher tolls, but in each case the tolls are paid not in respect of the wagons, but in respect of the goods. In March, 1885, the Defendants sent in a claim for £237 7*s.* 10*d.*, but that included charges for goods carried in other wagons. They afterwards sent in a smaller account in respect of these nine wagons, amounting to £25 11*s.*,

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for which they claimed a lien under sect. 97 of the *Railways Clauses Consolidation Act*, 1845 (1). We do not raise any argument for the purpose of inducing the Court to put a restricted meaning on "tolls," though *Wallis* v. *London and South Western Railway Company* (2) is in favour of such a contention, but we rely on this: that the Act gives a lien on the carriage only for tolls due in respect of the carriage, a lien on the goods only for tolls due in respect of the goods. Here no tolls were due in respect of the wagons. The railway company might, therefore, seize the coals, but they could not seize the wagons. The latter part of the section does not affect us, as the Court has held these to be our goods, not goods of the *Blacker Company* against whom the tolls were charged. The title of the *Blacker Company* to these wagons had determined before this action was commenced. The lien under the first part of the section, if it could apply to the wagons at all, could only be on them before they left the premises of the railway company, it could not attach on them again when they returned from a future journey. The latter part of the clause might apply if these were the wagons of the *Blacker Company*, but they are not. The Defendants urge that our right to possession did not exist on the day on which they claimed to retain, but that is immaterial, all that we have to shew is that we were entitled to possession when we issued our writ. The *South Yorkshire and River Dun Company's Act*, 1864, under which the Defendants carry on their undertaking, gives, sect. 13, a toll for coal carried over the railway, additional tolls being chargeable if the coal was conveyed in wagons of the company, or by means of power provided by the company.

(1) Sect. 97 of the *Railways Clauses Consolidation Act*, 1845, is as follows: "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law."

(2) Law Rep. 5 Ex. 62.

There is, therefore, no toll in respect of the carriages, and the carriages cannot be seized. Then, again, there must be a proper demand of the tolls, and such a demand is a condition precedent to the right of seizure, and the sum must not be lumped: *Field* v. *Newport Railway Company* (1). Now there was no proper demand, for in none of the documents sent to the *Blacker Company* before the action commenced was there any distinction made between these and other wagons, the sum charged in respect of them all being mixed up in a general account. The Defendants now claim a lien upon these wagons for the arrears of toll due in respect of all the goods they have ever carried in them. There is no authority for such a claim. *Wallis* v. *London and South Western Railway Company* (2) gives a very confined meaning to sect. 97, and is in our favour. This decision was disapproved of in *Caledonian Railway Company* v. *Guild* (3), but we do not rely on the proposition laid down in the former case. We say the construction of the Act is that the railway company, if it wants to seize anything, except the very things in respect of which the tolls are due, must make out that what they seize belongs to the person who owes the tolls.

Henn Collins, Q.C., and *C. A. Russell*, for the Railway Company:—

The *Railways Clauses Act* intended to give a railway company a statutory lien upon goods carried by them. They are obliged to carry goods even for a wrongdoer, and it is fair that they should be at liberty to charge the goods with the tolls. The rightful owner must have the goods returned to him on payment of the tolls, so no injustice is done. Even as common carriers they would have a lien on what they carried. Sect. 97 gives a lien on both goods and carriages, and cannot be construed in the distributive way the Plaintiffs propose, for their construction makes the insertion of the word "carriages" in the 97th section when incorporated with our Act unmeaning, since our Act gives no toll on carriages. The toll is not a payment due on the carriage or on the goods, it is a charge for the use of the railway, and

(1) 3 H. & N. 409. (2) Law Rep. 5 Ex. 62.
(3) 1 Court Sess. Cas. 4th Series, 198.

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though the special Act only speaks expressly of tolls on the goods, the tolls are really payable for the carriages as well. The point has never been expressly decided, but in *Field* v. *Newport Railway Company* (1) it was assumed that the lien extends to the carriages as well as the goods. Sect. 98 throws some light upon the point, and shews that tolls on the goods were not intended to exclude tolls on the carriage, for an account is to be given of the point on the railway from which the carriage or goods have set out.

Then as to the demand, we have only to shew that there has been a demand and failure to pay. From the account rendered on the 4th of February, when we demanded payment from the *Blacker Company*, there is no difficulty in making out in respect of which wagons the charges were made. If we made too wide a claim of lien, that does not waive the lien to which we are entitled: *Scarfe* v. *Morgan* (2); and under sect. 97 if the company can lawfully get hold of the wagons, it can retain them for all that is due in respect of tolls. The carriages belonged to the *Blacker Company* when we seized them, we therefore lawfully obtained possession.

[COTTON, L.J.:—May not a lawful possession become unlawful, if the interest of the person against whom the right to seize arose, determines.]

At common law that no doubt would be so, but here we have a statutory power to seize with a right of sale. The *Blacker Company* still have an interest, for the agreement reserves rent until the carriages are restored to the Plaintiffs. The Plaintiffs ought at once to have given us notice that the title of the *Blacker Company* would determine in a month, and that we were at liberty to detain and sell only for that period.

COTTON, L.J.:—

This case has been very fully and ably argued. The only question which has now to be determined is whether the Defendants have a right to detain and sell certain wagons belonging to the Plaintiffs. On the previous occasion we decided, contrary to the view taken by the Vice-Chancellor, that the Plaintiffs

(1) 3 H. & N. 409. (2) 4 M. & W. 270.

were entitled to these wagons, subject to the question raised by the railway company under the 97th section of the *Railways Clauses Consolidation Act*, 1845, which was incorporated with their special Act. It must be remembered that in dealing with this question, although we may gain assistance from looking at the cases decided upon common law lien, what we have to decide is not any question arising under a common law lien claimed by the Defendants, but what are their rights under this particular section as regards the wagons which belonged to the Plaintiff company, but which were held and used by the *Blacker Colliery Company* under a letting agreement entered into between them and the Plaintiffs. Under this agreement the *Blacker Colliery Company* had the use of the wagons, paying rent for them; but if the rent fell into arrear, the Plaintiff company had a right to put an end to the interest of the *Blacker Colliery Company*, and to resume possession of their wagons, though if there was no such determination by the Plaintiffs of the interest acquired by the *Blacker Company*, that company had a right to buy the wagons at a nominal price at the determination of the period of letting.

Under sect. 97 there are many difficulties in the way of the Defendants' claim. But in my opinion it will only be necessary to deal with two of them.

The section is divided practically into two parts. The first part enacts that, "If, on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods." That, as I understand, means this, that where there is a toll due in respect of a carriage or in respect of goods the railway company, before they part with the carriage or with the goods in respect of which they have a right to toll, may demand payment, and if payment of that toll is not made, then they may detain and sell the carriage or the goods in respect of which the toll is demandable; that is, they have a lien upon the things in respect of which the tolls are due. This applies only to goods or carriages which have not been removed from the premises of the railway company. Then we come to the second part: "Or, if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within

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such premises belonging to the party liable to pay such tolls." I need not notice the part of the section which provides how the proceeds of sale are to be applied.

Now have the Defendants any claim under either of those portions of the section? They have sent in a claim for £25 11*s.* in respect of all the journeys on their line performed by these particular nine wagons about which the question arises. I think it right to state my opinion, that (even if other difficulties were out of their way) they could have no right to detain and sell except in respect of the tolls (if any) which became due in respect of those carriages during the period of their being in the uninterrupted possession of the railway company, because in my opinion the first part of the section does not give them any right of retainer or sale in respect of tolls payable before the carriages or the goods last came into their possession. The railway company can only have the right in respect of the tolls accrued since the goods were last out of their possession. Here, then, the company could only claim their right in respect of the last journey, since after each of the former journeys those carriages went out of the possession of the railway company into that of the *Blacker Colliery Company*.

But have the railway company a right to detain and sell even in respect of any toll due to them for the last journey, that is, a toll accrued during the period for which the carriages have not been out of their possession? I omit here the question whether there has been a proper demand. That would require further consideration if the case turned upon it; but the real point here is in my opinion this, whether it can be said that there were any tolls due in respect of those carriages, or any of them.

It was urged very strongly that, although the tolls were given in form by the special Act as on the coals carried, yet that really they were payable in respect not only of coals, but also of the carriages in which the coals were carried, and that otherwise no reasonable meaning can be given to the use of the word "carriages" in the 97th section of the *Railways Clauses Act*, 1845. But it must be remembered that the Act of 1845, although by incorporation it becomes part of the subsequent Act under which the Defendants are acting, was not passed at the same time, and

in my opinion it would be wrong to construe this section by saying that unless you construe it in a particular way there can be no meaning given to particular words in it, having regard to the enactments of the special Act. This general Act was to be incorporated with special Acts containing different special provisions, and unless it could be shewn (which it manifestly cannot) that no tolls could ever be due in respect of carriages, we cannot be driven from what I think would otherwise be the correct construction of the expression "tolls due in respect of any carriage or goods," viz., tolls in respect of carriages, or separately tolls in respect of goods, merely because the special Act, passed long subsequently, does not give any tolls payable in respect of carriages. Moreover, it is obvious on the face of the Act of 1845 that at that time it was contemplated that the railways should be great highways, to be used not only by the railway companies, but by any persons who brought on to the railway engines and carriages of their own, suitable to run upon the railway. In my opinion what is required in order to bring the Defendants within the first part of this section is, to shew that what they claim are tolls due in respect of the carriages which they claim to detain, whereas the toll given by the special Act is a toll on the coals which have been carried, and in respect of them only. The Legislature, I presume, in passing the special Act, considered it the most convenient thing to give toll upon the coal, and not in respect of the carriage. Therefore in my opinion their claim under the first part of the section cannot be maintained.

But can the railway company maintain their claim under the second part of the section? In my opinion that can be disposed of without going into the question of whether there has been a proper demand, and also without going into the question as to whether the toll here claimed by them includes anything in respect of which no right was given them under the 97th section. I refer to that because there is a case of *Wallis* v. *London and South Western Railway Company* (1) which cuts down very much the meaning of the expression "tolls" in the 97th section, and we were referred to *Caledonian Railway Company* v. *Guild* (2) as an authority to the contrary. It is not, in my opinion, necessary to

(1) Law Rep. 5 Ex. 62.

(2) 1 Court Sess. Cas. 4th Series, 198.

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decide that point. The question is what have the railway company a right to detain and sell in respect of tolls demanded by them—whatever "tolls" may include. They have only a right to detain carriages or goods which are on their premises belonging to the party liable to pay such tolls—whatever "tolls" may mean. There may come a question hereafter, which does not arise in the present case, whether to enable them to detain and sell carriages under this part of the section there must not be due tolls in respect of carriages, and to enable them to sell goods, tolls due in respect of goods. I give no opinion on that question, and I do not at all desire to give too narrow a construction to this section. But can it be said that the railway company have any right against these carriages, which at the time when the action was brought belonged no longer to the *Blacker Colliery Company*, but to the Plaintiffs? In my opinion it cannot. If they have a right to detain there is power to sell, and in my opinion it never can be that when the Act of Parliament gives them power to detain and to sell carriages or goods belonging to the party who is liable for the toll, that gives them power to detain as against the real owner, and to sell as against the real owner, property not belonging to the party liable to the toll.

But it is said that at the time when the detention took place the *Blacker Colliery Company* had an interest. I agree it is not necessary to decide whether "belonging" means "belonging absolutely." I should say that it did not, but that if the person from whom the tolls were due had a lease of the carriages for five years then the railway company might detain and sell that interest. But here the interest of the *Blacker Colliery Company* in these wagons came to an end, and after that the Defendants had no title to retain the wagons as against the Plaintiffs.

Then it was said that as the *Blacker Company* had a title in possession when the wagons were seized the detention was right, and that it could not subsequently become wrongful. It is true that the original detention would not become wrongful, but in my opinion if the first owner had a determinable interest, and the other owner who had acquired an interest in possession on the determination of the prior owner's interest came and asked to have his goods handed up to him, although the original de-

tention may have been lawful, yet the continuing of that detention became unlawful when the railway company were informed to whom the wagons belonged, and on his asking for them refused to give them up. Of course the damage will not be for the detention dating from the first period of detention, but only for detaining them after the real owner's title had accrued, and he had acquired a right to possession of the goods.

It was urged that the proper course for the Plaintiffs to have taken would have been to give notice to the Defendants that the interest of the *Blacker Company* would come to an end in a month, and that the Defendants might sell for a month as against the *Blacker Company*. In my opinion the not having done so does not deprive the Plaintiffs of the right which they had in consequence of the title accruing on the determination of the *Blacker Colliery Company's* interest. It would have been idle in the present case when the *Blacker Colliery Company* had got about a month's interest in the wagons for the Plaintiffs to have gone to the railway company, and to have said, "You can only detain these carriages for a month, sell them for a month."

Then it has been said that the *Blacker Colliery Company* still have an interest because under the contract they have agreed with the Plaintiffs to pay rent till the carriages are delivered up to the Plaintiffs. As a matter of contract between the *Blacker Colliery Company* and the Plaintiffs, the *Blacker Colliery Company* may be liable till the carriages are actually handed back, but the *Blacker Company* have no lawful continuing interest in them. The Plaintiffs asserted their right and desire to acquire possession of these wagons. In my opinion, therefore, from the time when according to the contract the *Blacker Colliery Company's* interest determined, it was wrong on the part of the Defendants to detain these carriages, and the Plaintiffs are entitled to have them delivered up.

LINDLEY, L.J.:—

This action, brought by the wagon company against the railway company, was commenced on the 19th of May, 1885. It has been already determined that at that date the trucks in question were not the property of the *Blacker Company*, but the property

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of the Plaintiffs, subject to the dispute about the right of the Defendants to retain them.

The question we have now to decide is one of very great importance, because in substance it is a claim by the railway company to detain the wagons of the Plaintiffs for tolls due not from the Plaintiffs but from other people; in other words the railway company are claiming the right to detain, and, if necessary, to sell the property of one person for the debt of another. I do not say that such a right cannot exist, but when it is claimed it requires to be carefully investigated, and it appears to me that, for the reasons I will give presently, the claim made by the railway company in this case cannot be supported.

We start with this proposition, which, I think, is not altogether immaterial, that the railway company in this case were not, before or at the time of the commencement of this action, common carriers of coals. That gets rid of any such right of detention as they might have had if they had been such common carriers. It is also unnecessary to consider the case of *Wallis* v. *London and South Western Railway Company* (1) as to the meaning of the word "tolls." Neither have we to consider another point urged by the Respondents' counsel as to which there might be some difficulty if these trucks had been the property of the colliery company who owned the coal.

Now let us consider the 97th section of the *Railways Clauses Act*. That section is not so worded as to be free from difficulty, for several reasons that will be apparent as the words are read. The section starts with the words "If on demand." It does not say upon whom that demand is to be made. "If on demand any person fail to pay the tolls due in respect of any carriage or goods." I confess I do not understand how any person can fail to pay tolls within the meaning of that section unless there has been a demand upon him to pay. And there is a difficulty in my mind in saying that there ever was a demand by the Defendant company here upon the Plaintiffs. There was a demand, at least I assume there was a demand, by the letter of the 4th of February, 1885, on the part of the railway company against the *Blacker Company*, but it appears to me that in order that any

(1) Law Rep. 5 Ex. 62.

person may fail to pay within the meaning of that section there must be a previous demand made upon him. Then it goes on, "it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods." That is obviously a very great extension of a common carrier's power, because it gives power to sell.

Now the question which arises upon that is, whether there can be truly said to have been any toll due in respect of these wagons. That is a question of fact which we cannot decide by looking into the *Railways Clauses Act*. When we look at the facts I cannot come to the conclusion that any toll was ever payable by any one in respect of these particular trucks. The toll which was payable was payable in respect of the coal carried in the trucks, and not in respect of the trucks themselves. Whether under the special Act this company could or could not demand toll for hauling the wagons I do not know. I have not studied the Act with the view of ascertaining that. But if they could they never did. What they have done under the powers of the special Act, and that which we have to consider, is this,—they have not charged tolls in respect of these trucks at all, but they have charged tolls in respect of the goods, and therefore there never has been any toll whatever payable in respect of these particular trucks. Now I do not say that they had no right to charge for hauling the trucks. That, again, is another question, and, looking to the case of *Field* v. *Newport Railway Company* (1), I think very likely they had such a right. But, supposing they had it, that case is an authority for saying that any charge which they might have made in respect of hauling these trucks is not under the circumstances a toll within the meaning of this expression. It appears to me, therefore, that they cannot justify the detention of these trucks, inasmuch as there is no toll due in respect of them.

As the wagons in question have been decided not to have been the property of the *Blacker Company*, but of the Plaintiffs, the case founded on the second part of the section does not arise, for it enables railway companies which have let goods or carriages to transfer their lien and their power to sell to other carriages and goods belonging to the same person.

(1) 3 H. & N. 409.

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For the reasons I have given it appears to me that the appeal ought to be allowed.

LOPES, L.J. :—

The question in this case is whether the railway company have a right to detain and sell the carriages in question, and that depends upon the construction of the 97th section of the *Railways Clauses Act*, which was a general Act passed for the purpose of consolidating certain provisions usually inserted in special Acts.

That Act was passed in the year 1845, and it appears to me to be material to bear in mind that it was intended to apply to a state of things different from that which exists at the present time. It seems, having regard to the group of sects. 114–125, that it was contemplated that private owners would run their own carriages over the railways, which were to be public highways, and not only their own carriages but also their own private engines. Bearing that in mind, it seems intelligible that the Legislature would draw a distinction between tolls payable in respect of carriages and tolls payable in respect of goods. I have no doubt but that there was an idea that, in the special Act, separate tolls would be chargeable for the transit of owners' carriages over the line of railway, and separate tolls for goods.

Now, that being so, it becomes material to consider what the tolls in this particular case are chargeable in respect of. Having regard to the evidence and the arguments which have been brought before the Court, I am of opinion that the tolls in question were not tolls due in respect of carriages, but were tolls due in respect of goods. Then referring to the 97th section, it appears to me that it is a condition precedent, at any rate so far as the first part of that section is concerned, that in order to authorize the company to detain and sell a carriage or carriages the toll in question should be due in respect of a carriage or carriages. That appears to me to be clear with regard to the first part of the section, and I am inclined to think that it is also necessary in order to authorize the company to detain and sell under the second part of the section that tolls should be due in respect of carriages. But I do not desire to express a decided opinion upon that in the present case, because it is not necessary to do so.

The railway company, according to my view, fail to justify their right to detain and sell under the second part of the section, because the carriages in question did not belong to a party liable to pay toll within the sense and meaning of that portion of the 97th section. On these grounds I think this appeal ought to be allowed.

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Solicitors: *Ridsdale & Son*, agents for *G. T. Barras, Rotherham*; *Cunliffes & Davenport*, agents for *R. Lingard-Monk, Manchester.*

H. C. J.

In re TRADE-MARK "NORMAL."

C. A. 1886 CHITTY, J. *July* 30; *Aug.* 4, 5. C. A. 1887 *Feb.* 24, 25.

Trade-mark—Patents, Designs, and Trade Marks Act, 1883, *ss.* 62, *sub-s.* 4, 90—*Refusal by Comptroller to register—Appeal—Board of Trade.*

A person whose application to register a trade-mark has been refused by the Comptroller cannot appeal direct to the Court from such refusal, as a person aggrieved by the omission of his name from the register under sect. 90 of the *Patents, Designs, and Trade Marks Act*, 1883, but must take the special course prescribed by sect. 62 (sub-sect. 4) of appealing to the Board of Trade from the Comptroller's decision.

MOTION.

In June, 1886, application was made by the *Normal Company, Limited*, to the Comptroller of Trade-marks for registration of the word "*Normal*" as a trade-mark in class 42, in respect of food substances and ingredients. The Comptroller, after hearing the application, refused to register the word "*Normal*" as a trade-mark on the ground, it was stated, that he had received instructions from the Board of Trade not to register dictionary words as "fancy words" within sect. 62 (sub-sect. 4) of the Act of 1883. On the 30th of July the Company moved before Mr. Justice *Chitty* that the Comptroller might be directed to proceed with the registration of the trade-mark "*Normal*" belonging to the Applicants and that for that purpose all necessary directions might be given by the Court.

On the motion being opened, a preliminary objection was taken on behalf of the Comptroller, that the Court had no jurisdiction to deal with an application for registration which had been refused by the Comptroller, unless the applicant had first

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appealed from the Comptroller to the Board of Trade, as pointed out by sect. 62 (sub-sect. 4) of the *Patents, Designs, and Trade Marks Act*, 1883, and the Board of Trade had referred the appeal to the Court under sub-sect. 5 of the same section. The motion thereupon stood over to have the preliminary objection argued.

Sir *H. Davey*, Q.C., and *Ingle Joyce*, for the Comptroller :—

The scheme of the Act of 1883, which is an Act to amend and consolidate the law relating to patents, registrations of designs and trade-marks, differs entirely from that of the former Act of 1875. Designs and trade-marks are dealt with separately from patents, and sect. 47 provides for the mode of registering designs by application to the Comptroller, from whose refusal to register an appeal lies to the Board of Trade (sub-sect. 6), whose decision is final. The same course is adopted with respect to trade-marks (sect. 62) with this addition (sub-sect 5) that the Board of Trade "may, if it appears expedient, refer the appeal to the Court." In the case of *Sheffield* marks a further appeal to the Court from the decision of the Comptroller on appeal from the *Cutlers' Company* is expressly given by sect. 81 (sub-sect. 12). As to designs, therefore, the scheme of the Act is that the final appeal shall be to the Board of Trade ; as to trade-marks, that the Board of Trade shall sift out and determine what are and are not trade-marks proper to be registered, with a discretion in all cases of difficulty to refer the question to the Court. Where an appeal to the Court is given it is given in express terms ; as in sect. 69 (sub-sect. 4) where notice of opposition to registration has been given ; in sect. 71 where there are conflicting claims to registration ; in sect. 81 (sub-sect. 12), in the case of *Sheffield* marks. The Court, therefore, in all other cases unless the appeal from the Comptroller has been referred to it by the Board of Trade, has no jurisdiction. The course of procedure is pointed out by the Act, and the applicant has no option. If registration has been refused he must appeal from the Comptroller to the Board of Trade, but cannot come direct to the Court. Sect. 90 is not sufficiently express to alter or control the express provisions of sects. 47 and 62. The jurisdiction given by that section is to deal with the omission without sufficient cause of the name of the owner of a

mark from the register, but there must be a mark actually on the register. A summary method is thus provided for remedying what might otherwise have given rise to an expensive action.

Aston, Q.C., and *Chadwyck Healey*, for the Applicants :—

The course prescribed by sect. 62 is optional only, not compulsory, as is shewn by sub-sect. 4, which is that the Board of Trade "shall, if required, hear the applicant and the Comptroller." The Board of Trade have no power to administer oaths, and they are not bound to proceed with the appeal in public, one of the most important elements in the administration of justice; and it is not conceivable that the Legislature intended to give judicial powers to such a tribunal. Had it been intended to take away the right of appeal to the Court that has always existed, and was expressly recognised by the Act of 1875, the words of the Act of 1883 would have been much more explicit. Rectification of the register under sect. 5 of the 1875 Act, which is the substratum of this Act, was done by supplying an omission, and is not necessarily an alteration of the register, which is already complete. *In re Rivière's Trade-mark* (1) shews who may apply as "aggrieved persons." Sect. 90 still continues the same option to the applicant for registration that he had under the old Act: sect. 5, "omission of the name" in sect. 90 being only another equivalent for refusal to register. That section is wide enough to authorize an appeal to the Court from the refusal of the Comptroller to register, and sect. 62 does not in terms or by implication exclude such application, and we contend that these two sections must be read as parallel sections, giving an alternative remedy and not as controlling each other.

Sir *H. Davey*, in reply.

CHITTY, J. :—

The right to be placed on the register is created by the statute, and the other modes of ascertaining and enforcing the rights are prescribed by the statute itself. The case therefore depends solely on the true construction of the Act of Parliament; there is

(1) 26 Ch. D. 48.

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no inherent jurisdiction in the Court applicable to this matter. The question is whether in the case of refusal by the Comptroller only one course is open to the applicant, viz., to appeal to the Board of Trade, or whether he has an option to come to the Court directly from such refusal. The question turns principally on the construction of sects. 62 and 90 of the Act, but before reading these sections it will be proper and convenient to refer to the statute generally. [His Lordship, after referring to the establishment by the Act of registers for patents (sect. 23), for designs (sects. 47–55), and for trade-marks (sect. 62), and the provisions of sect. 47, sub-sects. 5, 6, 7, proceeded:—] With regard to the Comptroller, these provisions of the 47th section, as well as the provisions of the 62nd section, must be read in connection with sects. 94 and 95 which make provision with reference to the exercise of the power conferred by the Act on the Comptroller. The nature of these powers conferred on the Comptroller is, according to the exact term used in the Act of Parliament, discretionary; but it is of a judicial nature, and I say that, because Parliament has provided that the Comptroller must hear the parties, and it thus imposes upon him one of the elementary rules of the administration of justice. It is not termed a judicial power, but that his functions in these respects are something of that nature is shewn by the Act itself. In sect. 47 (sub-sect. 6) the term is: "Any person aggrieved by any such refusal may appeal to the Board of Trade." That term is not used in sect. 62, but it is found in sect. 90. Again, in sect. 47 (sub-sect. 7), the Board of Trade, where there is what is termed here an appeal to them, apparently are made the final tribunal for the decision of the question, because by this sub-section there is no such power conferred on them, in terms at any rate, as is conferred by sect. 62, which is that they may, "if it appears expedient, refer the appeal to the Court" instead of dealing with it themselves. It does appear from sect. 47 that the Legislature considered that they might entrust this question, as to what design should or should not come on the register, to the Comptroller-General, subject only to an appeal to the Board of Trade. No doubt the word "only" is not used, but this is a statute prescribing a particular course of procedure with reference to a right established by the

statute itself, and I take it that the general rule on a matter of that kind, is that the course pointed out by the statute itself is the only course which the parties can pursue. Then, passing to sect. 62 the differences between that section and sect. 47 are apparent, but it appears to me that there is one course, and one course only, pointed out to the applicant who is dissatisfied with the refusal of the Comptroller, which is to appeal to the Board of Trade. The Board of Trade may, however, refer the question to the Court. [His Lordship, after referring to sects. 69, 71, 72, and 73, proceeded:—] The argument upon these sections, that it is not conceivable that the Legislature should have entrusted powers of this kind to such a tribunal as the Comptroller in the first instance, and the Board of Trade in the second, without the safety of publicity, which is one of the most important elements in the administration of justice, is no doubt entitled to great weight; but it appears to me that, so far as I have gone through the statute, it is not sufficient to counterbalance the express terms of sub-sect. 4. In the case of designs Parliament has apparently considered that it is a matter which should finally rest with the Board of Trade. And with regard to trade-marks, which are undoubtedly I think viewed by this Act of Parliament, and apart from the Act of Parliament may be said, to be a class of property of a very valuable description, the view which I gather solely from the Act of Parliament appears to be this: There may be questions with regard to trade-marks first coming on the register of such a character that they can be well disposed of by these authorities; but the Board of Trade is a great department of state, and it is fit to entrust these powers to the Board who, in the exercise of their discretion, and knowing their limited powers, bearing in mind that they cannot administer the oath, bearing in mind the non-publicity of their proceedings, will in the exercise of their discretion refer to the Court all cases of difficulty and complexity. Sect. 77, which relates to the effect of registration, is also material, and, if I am right in my view of the Act on this point, the result is that a person who, I will assume, is entitled to be, but by some error has not been, put on the register by the Comptroller or by the Board of Trade, loses his right, because it is useless to have a trade-mark which you cannot protect in the case of infringement.

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As to old trade-marks, however, a distinction is drawn, and where there has been a refusal there is the right to institute proceedings to prevent an infringement or to recover damages for infringement on production only of course of the certificate of refusal. So that the validity of the old trade-marks is not dependent on the non-registration.

Passing to sect. 90, and, reading that section alone, I should at the first blush have been disposed to hold that but for sect. 62 it was sufficient to justify this application. But I am not at liberty to read sect. 90 apart from sect. 62, and apart from those other provisions of the Act which are material to the decision of the question. With respect to the argument that this section has nothing to do with placing the mark on the register, that seems to me to be a very narrow construction. I think the words here would, if standing alone, be sufficient to enable or authorize the Court to insert upon the register in reference to a trade-mark the name of any person which had been omitted without sufficient cause, and that, I think, is shewn by the subsequent words "entry made;" the provision being that the Court may make such order as it thinks fit for making, expunging or varying the entry. The register is not a mere list of names, it is a register of names in reference to marks. In the *Companies Act*, 1862, s. 35, the word "name" appears, and nothing is said specially with regard to shares; and it is a matter of course to rectify the register under that section where a person's name appears, and rightly appears on the register, but is wrongly entered with reference to the shares. Whether the shares are fully paid-up, or partly paid-up, or not paid-up at all, are all of them questions which fall clearly within the scope of the 35th section, the language of which is somewhat similar to this. But these observations do not dispose of sect. 90, and it appears to me that the words are not strong enough to overrule the provisions of sect. 62. I desire to refrain as far as I can from expressing any opinion beyond what is necessary for the decision of the case, but I feel compelled to say—without absolutely binding myself, but in order to follow the course of reasoning through which my mind has gone—that the terms "without sufficient cause" would not include the case of a refusal by the Comptroller, an appeal to

the Board of Trade, and the Board of Trade not referring the appeal to the Court, but deciding that the applicant ought not to go on the register. I think that would not be wholly an omission without sufficient cause, or, in other words, would be an omission with sufficient cause.

I do not say that this question is wholly free from doubt, but I revert to the proposition which I have already stated, that there is a particular mode pointed out by the statute, and pointed out in such a manner, and in such a particular manner, as that the Court ought to give effect to it.

I may add that the provisions contained in sect. 81 [to which his Lordship referred] with respect to *Sheffield* marks are not altogether immaterial on this question, and I read them as throwing light upon sect. 90 and upon sect. 62, and also as containing terms in strong contrast with the terms of sect. 62.

I do not think it necessary to refer at any length to sect. 5 of the Act of 1875, because that somewhat cumbersome section has been directly modified by the express provisions of this Act. In that section, which contained the whole law on this part of the subject, there is an express provision giving the Court power to determine what is and what is not a trade-mark for the purposes of the Act, and what trade-marks are to come upon the register, and that power is not repeated in terms in sect. 90. Moreover, sect. 5 does not contain any provision in any way corresponding to sect. 62. That appears to me to be an important observation with reference to the bearing of the prior enactment. Now I only read a prior enactment which has been repealed, for the purpose of ascertaining what the law of the subject was before the repeal, and the Act of 1883 is not merely a consolidating Act, but, as appears from the title, it is an amending Act also, and I think I should be going too far, and be led into what may be an erroneous view of the legislation, if I attempted to construe sects. 62 and 90 of the Act of 1883 with reference to the provisions of sect. 5 of the Act of 1875, which are not only not repeated but which are clearly materially altered.

The result, therefore, is that the objection prevails.

F. G. A. W.

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In re TRADE-MARK "NORMAL."

From this decision the *Normal Company* appealed. The appeal came on for hearing on the 24th of February, 1887.

Aston, Q.C., and *Chadwyck Healey*, in support of the appeal:—

The provisions of sect. 5 of the *Trade Marks Registration Act*, 1875, which reserved to a person aggrieved by the refusal of the Registrar to enter on the register his name as proprietor of a trade-mark the right of applying to the Court for rectification of the register, have been deliberately re-enacted by sect. 90 (sub-sect. 1) of the Act of 1883; and though an alternative remedy, by appeal to the Board of Trade, is provided by sect. 62 (sub-sect. 4), that section is not imperative, and the right of appealing to the Court direct from the Comptroller is still open to the applicant, who is, we submit, a person aggrieved within the meaning of sect. 90, which in no way limits or defines the kind of grievance which gives the right to apply to the Court: *In re Rivière's Trade-mark* (1). That section, moreover, appears in Part V., headed "General," and has universal application. We do not seek to overrule sect. 62, but that full effect should be given to sect. 90, which has not been done in the Court below. It cannot have been intended that the right of a trader to have his mark registered was to be finally concluded without power of appeal by the decision of a fluctuating body like the Board of Trade, which has none of the characteristics of a judicial tribunal, has no power of examining witnesses, or of arriving at a legal decision after hearing both sides: *Orr Ewing* v. *Registrar of Trade-marks* (2).

[COTTON, L.J.:—We must assume that the Board of Trade will exercise their discretion properly, and that if any legal point arises they will, under sect. 62 (sub-sect. 5), refer the appeal from the Comptroller to the Court.]

We do not say that they will not exercise their discretion properly, but we do say that their decision may be wrong in point of law, and therefore ought not to be final, and without power of

(1) 26 Ch. D. 48; 49 L. T. (N.S.) 506; 50 L. T. (N.S.) 763.
(2) 4 App. Cas. 479.

revision by the Court in such cases. At the time when the Board of Trade issued their instructions not to register dictionary words the decisions of the Courts in the "*Alpine*" and "*Electric*" cases were the other way, and were thus practically disregarded.

Sir *R. Webster*, A.G., and *Ingle Joyce* (Sir *H. Davey*, Q.C., with them), for the Comptroller:—

In re Rivière's Trade-mark (1) was decided on the construction of sect. 5 of the Act of 1875, which is differently worded from sect. 90 of the Act of 1883, and has not, we submit, been re-enacted. In order to bring sect. 90 into operation there must be a mark already on the register, and some disputed question of title, over which the Comptroller has no jurisdiction, raised. Sect. 90 (sub-sect. 1) deals with the omission without sufficient cause of the name of any person from the register, while sect. 62 (sub-sect. 4) deals with the refusal to register a trade-mark: thus clearly raising a distinction between the registration of a trade-mark and the registration of the name of the owner of a trade-mark. In the case of opposition to the grant of a patent the decision of the Comptroller is "subject to appeal to the law officer:" sect. 11 (sub-sect. 2); and in the case of refusal by the Comptroller to register a design "any person aggrieved by any such refusal may appeal therefrom to the Board of Trade:" sect. 47 (sub-sect. 6); thus shewing that it was not intended by the Act to give a right of appeal to the Court from the decision of the Comptroller as to whether a particular design or mark should be registered. By sects. 94, 95, and Trade Mark Rules, 1883, 17–19, provision is made for securing the proper exercise by the Comptroller of his discretionary power under the Act; and when that discretion has been exercised it cannot be said that there has been "the omission without sufficient cause" of the Applicants' name. The omission of the advertisements prescribed by sect. 69 is also fatal to the Applicants' case: *In re Rivière's Trade-mark* (2). Although the Applicants rely upon sect. 90 they do not ask for a rectification of the register, but for a direction based upon sect. 62 that the Comptroller be directed to proceed with the registration.

(1) 26 Ch. D. 48. (2) 53 L. T. (N.S.) 237.

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Aston, in reply:—

Admitting that the decision of the Comptroller is not final, but that an appeal to the Board of Trade is given, we say that course is merely optional. If we had gone in the first instance to the Board of Trade, we should, by choosing one of the alternative remedies open to us, have been estopped from applying to the Court under sect. 90.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*, who, without entering into the merits of the case of the Applicants to have their trade-mark registered, decided that they were not entitled to come to the Court unless the Board of Trade referred the question to the Court under sect. 62 (sub-sect. 5). From that there is an appeal, and what we have to consider is whether sect. 90, which is the section relied upon, does give any applicant, who does not succeed in having his trade-mark registered on application to the Comptroller, a right to come to the Court, and to get an order that that registration ought, nevertheless, to be proceeded with. One great argument addressed to us was that sect. 5 in the previous *Trade Marks Registration Act* of 1875 gave a right to any applicant who wanted to have a trade-mark registered, of which the registration was refused by the then Registrar, to come to the Court on motion to have it decided that it ought to be registered. It was said it is hardly to be supposed that that right which proprietors, or persons claiming to be proprietors of trade-marks had under the old Act, has been taken away by the present Act. Then it was further said, sect. 90 of the present Act is very much like sect. 5 of the old Act, and must have been intended to give the same right which was exercised under sect. 5. As regards taking away a right which a party had, that to my mind has nothing to do with the matter. The Act of 1875 is gone. The right which the Applicants have to be registered is a right under the new Act, and the sole question which we have to consider is whether sect. 90 gives the same rights which unsuccessful applicants for registration had under the 5th section of the Act of 1875.

Now in the first place there is a great deal of difference in the wording of the two sections. In sect. 5 of the Act of 1875 there was a distinct and specific reference to the case of the Registrar refusing to enter a trade-mark—either refusing it altogether, or refusing to enter a particular person as proprietor of that trade-mark, and then, there being no other provision with reference to appeal from the decision of the Registrar, it was held under that section that any person applying unsuccessfully to the Registrar might come to the Court if he was so advised. It will be seen that that is not the same in the present Act. First of all the words are different. The 90th section provides that the Court may, on the application of any person aggrieved by the omission, without sufficient cause, of the name of any person from any register kept under this Act, make an order for making, expunging, or varying the entry. Now if there is any other provision in the Act specially applying to the matters in respect of which the Applicants come to the Court, there is not to my mind nearly so strong an argument in favour of the construction of sect. 90 contended for, as there was upon the words of sect. 5 of the Act of 1875 that that section was intended to provide for such a case. There is a special provision in this Act with reference to a refusal by the Comptroller, who is substituted for the Registrar, to register a trade-mark. Sect. 62 provides that the Comptroller may, on application by or on behalf of any person claiming to be the proprietor of a trade-mark, register a trade-mark. A certain form of application is given (sub-sect. 3), and then sub-sect. 4 says: "The Comptroller may, if he thinks fit, refuse to register a trade-mark, but any such refusal shall be subject to appeal to the Board of Trade, who shall, if required, hear the applicant and the Comptroller, and may make an order determining whether, and subject to what conditions, if any, registration is to be permitted." Then, it is provided, that the Board of Trade may, if it appears expedient, refer the appeal to the Court. Now, if the Comptroller refuses to enter a trade-mark, as in the discretion given to him he may, there being liberty to appeal to the Board of Trade, it is very difficult, in my opinion, to say that the applicant coming to the Court would be aggrieved by the omission, without sufficient cause, of the name

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of any person from the register, because the decision of the Board of Trade is not made subject to any right of appeal. I, myself, value the right of appeal, and hold that it should be as extensive as possible; but where there is, as here, a special procedure laid down by an Act, and a special mode of remedying any defect of the judgment of the first person to whom the matter is brought, by reference to a department of state, I think it would be wrong to say without express words that an appeal to this Court was given. Although, therefore, "aggrieved" did in the previous Act point to any one who said that without sufficient reason the Registrar had refused his application, it could hardly be said where the Comptroller under the present Act has done the same thing, and the unsuccessful applicant, who has a right to appeal to the Board of Trade, has not exercised that right of appeal, that the applicant's name was without sufficient cause omitted from the register.

Then there is this to be considered: by sect. 62 (sub-sect 5) a power is given to the Board of Trade to refer the matter to the Court. It is said that it is most unreasonable to suppose that this is the only remedy given to any one whose application has been refused. The question may very often depend, it is said, and rightly said, on questions of law and questions of fact, and it is not to be supposed that the Board of Trade would be a tribunal selected by Parliament for the decision of a point of law, and that that tribunal could effectually deal with questions of fact. In my opinion this Act shews that very large powers were intended to be committed both to the Comptroller and to the Board of Trade. There is a mode prescribed of applying for registration, and thus to get the benefits which follow registration; and an entirely new body is selected, by whom that registration is to be controlled and effected, and it is not at all unreasonable to suppose that this was the way, and the only way, in which questions as to the right of registration were to be decided, when there is the power given to the Board of Trade to refer any questions which arise to the Court. It is wrong, I think, to suppose that an important department of state would exercise a discretion given to it in an unreasonable way. It appears that they never have done so. I do not mean at all to

suggest that in all cases it would be the duty of the department to refer the question to the Court. They may come without hesitation to the conclusion that an existing decision, either of this Court or of the House of Lords, has decided the matter, and if they came to that conclusion, then they would probably say, and would be right in saying, "This has been already decided." If there was a reasonable question which they did not feel themselves competent to deal with, then no doubt they would exercise their discretion under the special power given them by sending the matter to a Court of Law.

Then where do we find sect. 90? It is found in a part of the Act which refers to general matters, the previous portions of it being divided into grant of patents, registration of designs, and registration of trade-marks, and it is introduced with the reference to the registers which are to be kept shewing the title and the devolution of title to patents, to designs, and to trade-marks. From the position in the Act in which it comes, following immediately after the directions as to keeping the registers and as to what shall be entered there, and that sealed copies are to be received as evidence, it is to be inferred that a power is here given to the Court to remedy any defects which there may be in the registers. The Attorney-General contended, and I think rightly, that if there was that entered on the register which could not properly be registered at all under the Act, then there would be a power, on application to the Court by any person aggrieved, to have that which could not be the subject-matter of a trade-mark under this Act struck off. That is entirely different from the question whether under the first part of the section there is a right to come to the Court, instead of going to the Board of Trade, in order to have it decided whether a particular thing is a proper trade-mark to be registered. There is a previous provision made for having that question decided, and in my opinion it would be wrong therefore, and would be giving a strained interpretation to sect. 90 to say that under it there is a right given to appeal from the Comptroller's decision, or his exercise of discretion to refuse to register, when in a previous part of the Act another mode of dealing with that refusal is pointed out in plain language. The decision of Mr. Justice *Chitty* was right, and the appeal fails.

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LINDLEY, L.J.:—

I am of the same opinion. The first observation that I will make is that the question we have to decide turns upon an Act which, when you come to look at it, is not a reproduction of the old Act, but is a new Act, consolidating and amending the Acts of Parliament previously in force relating to patents, relating to copyright of designs, and relating to trade-marks, and although it is impossible to understand this Act properly without knowing something of the law as it stood previously to the passing of it, it would be an entire mistake, in my opinion, to construe sect. 90 in this Act simply by treating it as a reproduction of sect. 5 in the *Trade Marks Registration Act* of 1875. You must look at this Act of Parliament, and consider not only the language of the particular sections on which the case mainly turns, but also the general scheme of the Act as a whole; and when looked at from that point of view it appears to me that the scheme of this Act as regards trade-marks is different from the scheme which was introduced in the Act of 1875.

More particularly one alteration, and a very important alteration, was made, and designedly made. Sect. 5 of the Act of 1875 has not been reproduced here at all. It has been taken to pieces, and subdivided, and recast, and that portion of the Act of 1875 which relates to the method of procuring the registration of trade-marks in the first instance, is no longer to be found in sect. 90, which reproduces a part of sect. 5, but is found in sect. 62, which introduces a wholly and entirely different machinery. Sect. 62 states what is to be done, and the question which we have to consider is whether in the event of the Comptroller declining or refusing to register a trade-mark there is an alternative course open to the Applicants; a course not of going on in the manner provided in sect. 62, but of coming straight to the Court, in order to get the Court to do that which it is the duty of the Comptroller to do under sect. 62.

It is said that it never could be the object of the Legislature to cast upon the Comptroller of Patents and Trade-marks, under this Act, the duty of deciding such important questions as must necessarily come before him under applications of this description. In order to deal fairly with that objection, which after all cannot

prevail against the true construction of the Act, let us observe what pains have been taken to protect the public from any undue exercise by the Comptroller of those powers. In the first place, it is important to observe that he is a person in a high official capacity, and by sect. 95 he is empowered to consult the law officers of the Crown whenever he is in doubt—a most important provision to my mind in considering the argument to which I am now addressing myself. It is not to be supposed, and we cannot act judicially on the supposition, that the Comptroller having that power of consulting the law officers of the Crown, would take upon himself to decide questions according to his caprice; and even if he were to do so there is an appeal to the Board of Trade under sect. 62 itself. Then if the Board of Trade, having equal access to the law officers of the Crown, feel any difficulty they are empowered to remit the case to the Court. I cannot conceive what further machinery a reasonable person would desire to have for his protection in these matters.

Then it is said that there is an alternative method. That depends on the true construction of the Act of Parliament. The case turns entirely on sect. 90, which provides that the Court may on the application of any person aggrieved by the omission without sufficient cause of the name of any person from any register kept under the Act, and so on, make such order as the Court thinks fit. But what must any person make out as a condition precedent to his right to come to the Court under this section. He must establish that his name is without sufficient cause kept off the register. Can a person who has applied to the Comptroller under sect. 62, and has got a decision against him, truly say that his name is kept off the register without sufficient cause within the true meaning of sect. 90? It appears to me that he cannot; he is kept off, not without sufficient cause, but with sufficient cause, and as I construe sect. 90 he cannot bring himself within it at all. In order to shew that this is not a narrow or forced construction let me go a little further. Under sect. 90 any order of the Court rectifying a register shall direct that notice of the rectification be given to the Comptroller. That provision of course might apply, and it is perfectly applicable to a great variety of cases, and it is important if sect. 90 has reference to other cases than this. When you come to consider

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whether sect. 90 is intended to apply to this case, it at all events shews to my mind that the Legislature was not dealing with this kind of applicant. Here the Applicants have no opponent at all except the Comptroller. You do not want a provision in such a case that the order of the Court shall be served on the Comptroller: he is *ex hypothesi* before the Court already. It is a slight thing, I do not say it is conclusive, but it points in the same direction, that sect. 90 is directed to a totally different class of cases. It appears to me that sect. 90 presupposes the mark to be on the register, and applies where any person comes to the Court for a rectification of the register, and does not apply to such a case as we are now dealing with: a case in which it is for the Comptroller, subject to the superior control of the Board of Trade, to determine whether a particular trade-mark is or is not to be registered. That is met by sect. 62, and not, according to my judgment, by sect. 90 at all. It appears to me that the view taken by Mr. Justice *Chitty* was quite right, and that this appeal ought to be dismissed.

LOPES, L.J.:—

A preliminary objection was taken in the Court below by the Respondent, that in the circumstances of this case there was no appeal to the Court. The Applicants in the Court below contended, and they contend here, that in the case of a refusal by the Comptroller to register a trade-mark there is an appeal direct to the Court without any intermediate appeal to the Board of Trade. Mr. Justice *Chitty*, in the Court below, decided against that view. It was contended before us that the Act of 1875, sect. 5, was to be looked at, and that it would assist the Court in construing the Act of 1883. I do not think it can afford the Court any assistance in the construction of the Act of 1883. It has been repealed, and the Act of 1883, according to my view, enacts a new method which is to be observed and followed in the future.

Coming to the Act of 1883 it is material to observe what is the scheme of that Act. It is divided into five distinct parts: Part I. is preliminary; Part II. relates to patents; Part III. to designs; Part IV., beginning at the material section, sect. 62, relates to trade-marks; and Part V., beginning at sect. 82, is general.

Sect. 62, which is the material section of Part IV., to my mind, clearly defines the mode, and the only mode, by which an applicant can obtain registration of his trade-mark. Sub-sects. 1, 2, and 3 deal with the application to the Comptroller. Sub-sect. 4 of sect. 62 gives the Comptroller a discretion in the largest terms, but any refusal by the Comptroller is to be subject to an appeal to the Board of Trade. Then comes sub-sect. 5, which is most material. According to my view the words there used "in that event" mean in that event only. If it were intended that the appeal to the department might be omitted, as is contended, and an appeal was given direct to the Court, it is difficult to understand what is the good of all this machinery which I find in sub-sect. 4, and also in sub-sect. 5. Again, if it were intended that an appeal should be given direct to the Court, omitting the appeal to the Board of Trade, it would be only reasonable to look for that appeal in this particular part of the Act which was exclusively devoted to trade-marks. Now I suppose, if there was not anything beyond sect. 62 in the Act, nobody would be bold enough to contend that there was any such appeal direct to the Court as is now contended for. But sect. 90 is relied upon. It appears, as I have already stated, in the general part of the Act. According to my view it relates to a subsequent state of things, after the initial proceeding of the Applicants to get on the register, as provided by sect. 62. The initial proceeding to be placed on the register must be under sect. 62, and the refusal of the Comptroller must be appealed from to the Board of Trade, and can only be reviewed by the Court if referred under sub-sect. 5 of sect. 62. That being so I would only further say that I do not feel impressed with the point which was so strenuously urged that unless this direct appeal existed injustice would be done to the Applicants. The Board of Trade is pre-eminently fitted from its great experience in commercial matters to deal with the jurisdiction which is conferred upon it, and I should venture to say that the integrity and impartiality of a great public department is beyond suspicion. In these circumstances I am of opinion that this appeal should be dismissed.

Solicitors: *Munns & Longden; Murton.*

F. G. A. W.

C. A.
1886
KAY, J.
July 22;
Aug. 2.
C. A.
1887
March 4, 10, 11.

In re ARBENZ' APPLICATION.

Trade-mark—Registration—"Fancy word not in common use"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 69.

Where, upon opposition to an application to register a trade-mark, the case stands for the determination of the Court under sect. 69, sub-s. 4, of the *Patents, Designs, and Trade Marks Act* of 1883, the Court has jurisdiction to enter into and determine all questions arising upon the objections, including, in a case where the Comptroller has already registered the mark, the question whether the mark has been rightly admitted on the register.

Where a name or word was originally, or has come to be, descriptive of the article to which it is applied, so that while indicating what the article is, it does not connect it with any particular manufacturer, such name or word cannot be registered as a trade-mark.

Accordingly, where at the time of an application made in 1884 for the registration of the word "*Gem*" as a trade-mark for air-guns which in 1881 had been newly introduced into *England* and called "*Gem*" air-guns by the Applicant, the word "*Gem*" had become descriptive of a particular pattern of gun, and not merely of the Applicant's gun, it was held that the word could not be registered as the Applicant's trade-mark for air-guns.

Per Cotton and *Lopes*, L.JJ., *Lindley*, L.J., *dubitante*:—The word "*Gem*" having now come to indicate the excellence of the article to which it is applied is not now a "fancy word" within the meaning of the *Patents, Designs, and Trade Marks Act*, 1883, sect. 64, sub-sect. 1 (*c*).

Decision of *Kay*, J., reversed.

IN 1881, the Applicant, *Adolph Arbenz*, introduced into the *United Kingdom* from *Germany* a new and special form of air-gun, which he called the "*Gem*," and which was protected in *Germany* by patent or equivalent protection. He placed the word "*Gem*" upon these guns, and sold them largely in the English market.

On the 5th of August, 1884, *Arbenz* made application to register the word "*Gem*" as a trade-mark for air-guns in class 19. His application was opposed by *Charles Osborne & Co.* of *Birmingham*, who, in their notice, dated October the 15th, 1884, gave the following grounds of opposition: "We have imported and sold these '*Gem*' air-rifles for several years, and have put the word '*Gem*' on when ordered; that we claim perfect liberty to use the word; and that our trade will be injured if *Arbenz*' request be complied with." *Arbenz*, by his counter-statement, alleged that when he introduced into and sold in the English market guns of this make

and bearing this name, no other person was manufacturing and selling air-guns bearing such name, that he was unable to register the word "*Gem*" alone until the Act of 1883 came into operation, and then at once applied for registration; that it was not the fact that *Osborne & Co.* had imported and sold "*Gem*" air-rifles for several years; and that he began to supply his "*Gem*" air-guns to *Osborne & Co.* soon after he introduced them into the market, and continued to supply them, until *Osborne & Co.* being refused a reduction in price, threatened to make air-guns themselves. *Arbenz* then took out a summons that the Comptroller might be directed to register the word "*Gem*" as a trade-mark notwithstanding the opposition of *Osborne & Co.*

The nature of the evidence on the part of the Applicant and Opponents sufficiently appears from the judgments of Mr. Justice *Kay* and Lord Justice *Cotton.*

The matter came before Mr. Justice *Kay* on the 22nd of July and the 2nd of August, 1886.

W. Pearson, Q.C., and *Willis Bund*, for *Arbenz*:—

The evidence shewed that Mr. *Arbenz* introduced, in the summer of 1881, to the English market an air-gun which he manufactured at *Basle*, and to which he gave the name of "*Gem*," and that word he put on the guns as a trade-mark. He had the sole right of introducing this gun into *England, Germany, America*, and *France*, but not into *Belgium.* He employed an agent to register the trade-mark under the *Trade Marks Registration Act* of 1875, but he was unable to register a word alone until the *Patents, Designs, and Trade Marks Act* of 1883 came into operation, and then registration was applied for. When he first used the word "*Gem*" it was not known as applied to air-guns, and no other person was manufacturing and selling such guns under that name, or brand. The Opponents to the present application, *Osborne & Co.*, allege that they have imported and sold "*Gem*" air-rifles for several years, and have put the name on them, but that is not the fact. Mr. *Arbenz* supplied *Osborne & Co.* with his "*Gem*" air-rifles soon after he introduced them. He continued to do so for some time, and until a reduction in price was refused. *Osborne & Co.'s* objection to the present application for registration, on the ground

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that the word "*Gem*" had become of common use as applied to air-guns when Mr. *Arbenz* made the application, cannot be supported; but the Court will, as submitted, hold that Mr. *Arbenz* is entitled to the use of the word, and to the registration of it as a trade-mark.

[They referred to the cases of *Ex parte Stephens* (1), *In re Barrow's Trade-marks* (2), *In re Hudson's Trade-marks* (3), *In re Heaton's Trade-mark* (4), *In re Trade-mark "Alpine"* (5), *In re Van Duzer's Trade-mark* (6), and *In re Leaf, Sons, & Co.'s Trade-mark* (7).]

Aston, Q.C., and *Macrory*, for *Osborne & Co.*:—

The evidence is clear that we imported and sold "*Gem*" air-rifles for several years, and put the word on when ordered. We had perfect liberty to use the word as one in common use in the trade; and our trade would be seriously injured if the application of *Arbenz* should be granted; therefore it should be refused, and with costs.

[They referred to the cases of *Linoleum Manufacturing Company* v. *Nairn* (8) and *"Singer" Machine Manufacturers* v. *Wilson* (9).

KAY, J., referred to *In re Leonard & Ellis's Trade-mark* (10) and *Ford* v. *Foster* (11).]

KAY, J.:—

I have no doubt whatever that this mark ought to be registered. What is sought to have registered is the word "*Gem*" as applied to air-guns. The word describes no quality of a gun, and it cannot in any way be treated as descriptive. Applied to a gun it is as purely a fancy name as any other name that can be conceived, and therefore it comes within the definition in the Act of 1883, and is a word which it is proper to register as a trade-mark applied to the particular kind of article.

The application is opposed by Messrs. *Osborne & Co.*, and therefore it is necessary to examine what the evidence in the

(1) 3 Ch. D. 659.
(2) 5 Ch. D. 353.
(3) 32 Ch. D. 311.
(4) 27 Ch. D. 570.
(5) 29 Ch. D. 877.
(6) 34 Ch. D. 623.
(7) 33 Ch. D. 477; on appeal, 34 Ch. D. 623, 632.
(8) 7 Ch. D. 834.
(9) 3 App. Cas. 376.
(10) 26 Ch. D. 288.
(11) Law Rep. 7 Ch. 611.

case proves. It appears that *Arbenz* introduced this particular kind of gun, which he called the "*Gem*," in the early part of the year 1881. The guns were manufactured by a firm in *Germany*, but were introduced by *Arbenz*, and by him marked with the word "*Gem*." He for a long time supplied *Osborne & Co.* with the guns. I have a number of exhibits, beginning in July, 1882, and ending in June, 1884, which are orders from *Osborne & Co.* for the guns, by the name of "*Gem Air-guns*." It seems that in 1883 *Osborne & Co.* wanted to have them supplied at a reduced price, whereupon *Wilkinson*, a member of the firm, wrote to *Arbenz* this letter:—"I'll bring out a '*Gem*' myself, and give you a dressing through the country, and you shall sell at my price. I'll make it hot. You won't work with me, so now I'll oppose you. I order a hundred from *Liége*, and will fight you." That was in April, 1883, and it was answered on the 24th of April, 1883—thus:—"Sir, Your letter to hand, and I am pleased to hear you intend to cut off your nose to spite your own face in your endeavour to make it hot for me. I am making out a fresh circular for the gun, and shall have pleasure to put your letter in as an advertisement for you. I may say that I have always been willing to work with you, but could not see my way clear to put you on better terms than my best customers are on, as, if I had done so, I should have been compelled to reduce the price to everyone." At that time, it was proved abundantly that *Arbenz* had advertised the articles he had selected in that way, and was selling largely, under the name of "*The Gem Air-gun*," and it is pretty obvious from the correspondence that *Osborne & Co.* were perfectly well aware of that. From that time forward *Osborne & Co.* have been importing guns made in exact imitation of these guns from *Liége*, or elsewhere, and have been selling them to people who inquired of them for "*The Gem Air-gun*," very extensively, and the bulk of the evidence before me consists of that of those persons themselves, and of people who have bought guns from them, and they said that they bought the "*Gem*" air-guns from *Osborne & Co.*, and did not know anything about *Arbenz*. That *Osborne & Co.* stole the name of "*Gem*" from *Arbenz*, and having dealt with *Arbenz*, down to April, 1883, largely in these guns, they took upon themselves to buy other guns made in imitation, and to sell

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them as "*Gem*" air-guns, without any communication with *Arbenz;* and *Arbenz*, after hearing all the evidence in the matter, stated in his affidavit in reply, this: "I also say that, notwithstanding the number of affidavits filed on behalf of the said *C. Osborne & Co.*, none speak of a time other than the end of 1883, when the '*Gem*' air-guns had been introduced by me over two years, and none of them allege that the deponents sold any air-guns marked '*Gem*' before I first introduced them, and all the said deponents have either been supplied with '*Gem*' air-guns by me directly, or by Messrs. *Osborne* while they were customers of mine. I further say that I was quite unaware that they were importing '*Gem*' air-guns from abroad, and that I believed that the '*Gem*' air-guns they were selling were the guns with which I had supplied them." I asked counsel to shew me, if they could, any statement, in all the affidavits filed on the part of the persons opposing the application, that this word "*Gem*" had become known in the trade as a description of a particular class of gun, and they have not done so. I have paid great attention to the evidence, and I do not remember any such statement on the part of the Opponents. I will notice directly the affidavits filed on the part of the Applicant, which really contain the only peg on which any argument could be based; but first I will take *Wilkinson's* statement, one of the firm of *Osborne & Co.* He said:—"On the 18th of April, 1871, a gun, which became known as '*The Junior*,' was patented in *America*. I shortly afterwards introduced it into this country. I advertised by means of samples carried by my travellers, and up to the present time sold a considerable number of them. In June, 1882, I was informed by several customers that the air-rifle known as '*The Junior*' had been nearly copied" (that is a very remarkable phrase, indeed—not copied, but nearly copied; that means it was not copied), "and was being advertised as '*The Gem.*' On inquiry, I found that the Applicant, *Adolph Arbenz*, had imported an article of German manufacture, and called it '*The Gem.*' The only apparent difference in the said two guns was that '*The Gem*' was smaller in the bore, and cheaper in price" (that is the apparent difference). "I discovered that *Arbenz* was damaging my trade by advertising '*The Gem*' as a

new pattern rifle. In 1882 and 1883 I purchased from *Arbenz* a quantity (perhaps 70 or 80) of his rifles to supply to my customers. I ascertained that the rifle was manufactured in *Germany*, and I purchased large quantities through a manufacturer in *Belgium*. I sold them to my customers as '*The Gem*.' I did not brand them as '*The Gem*,' as a rule" (this is an important part of his statement) "but only when ordered to do so, which was seldom. I always sold them as *Osborne's* '*Gem*,' and out of about 2000 customers I was never asked for *Arbenz*' rifle, but for '*The Gem*,' which referred to the rifles I obtained from *Belgium*, and were sometimes described as *Osborne's* '*Gem*,' or '*Junior*.' I have supplied large numbers of gunmakers and wholesale houses with the rifles imported by me, and many of them have advertised them as '*The Gem*.' I recollect about five years ago" (then he speaks of another firm who introduced a pistol called '*The Gem*.' The picture of that is before me. It is about as much like this rifle, or any rifle, as a walking-stick or garden-rake would be. It has nothing in the world to do with the matter. Then he says), "I know that the *Army and Navy Stores* have advertised '*The Gem*' rifle since 1883, and that the *Civil Service Co-operative* and *Junior Army and Navy Stores* have also done so. I have supplied all the above stores with such rifles. I have also supplied the rifle to *Henry Clarke*, gunmaker, *Leicester*, and have seen his advertisement of it as '*The Gem*.'"

That gentleman was cross-examined, and what is his evidence worth? He said, "I first saw a gun by the description of a '*Gem*' gun in 1872. I believe I first saw one called '*The Gem*' in 1872. I saw it in my warehouse in *Whittall Street, Birmingham*. I don't recollect who shewed it me. I don't know how I came to see it there, or who shewed it to me. I know Mr. *Arbenz* slightly. I see him here. I have had dealings with him for air-guns. I first began to deal with him, I think, in 1882. He sold guns to me, and he called them '*The Gem*.' I had never purchased guns of that name from anyone else. I think I had heard of guns of that name sold by some one else than *Arbenz*." Then he spoke of the pistol that I have been referring to: and then of a gun marked "1877." That was not produced, and there is nothing but his recollection about it; and it is explained by *Arbenz*, who

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said that it very probably was one of his guns, and that the "1877" upon it was the consecutive number which he put upon every gun, and that explanation I am quite ready to adopt, because otherwise there is no evidence whatever that the word "*Gem*" was ever applied to any gun of any sort or kind until *Arbenz* himself applied it. "I don't know of any other instance of the word '*Gem*' being so used before *Arbenz* applied it. I don't recollect whether *Arbenz* came to me and asked for orders. He might have done so, I had got air-guns from him for a year or more at intervals. I ceased dealing with him because I could buy the same thing abroad. I am aware that *Arbenz* has been advertising these guns extensively. I have seen the advertisements. It is very likely I made some application to him to reduce the price." The correspondence which I have referred to was put in, and then he said, "Before that letter I had imported guns from *Belgium*. I first began to do so in 1882, probably about the middle of the year. I cannot fix the date of that letter." The date is now fixed as April, 1883. Then he spoke of the difference of the "*Junior*" rifle, and said the difference consisted in the pitching of the locking-bolt, but I need not further refer to that. "The first gun I imported is known in the trade as '*The Junior*'; I have heard it spoken of as the '*Gem*' continually in my trade among my customers since *Arbenz* brought out the second gun. Till *Arbenz* brought out the '*Gem*' I never knew of that word applied to guns, except in the case of the pistol and the rifle in 1877," that is with the "1877" upon it. Then he said he supplied his customers when asked for a "*Gem*" rifle indiscriminately from his stock, and when he ran short he drew upon *Arbenz*' stock, and he said that the difference between the "*Junior*" rifle and the "*Gem*" was not in the locking-bolt only, but in the bore.

Now, test that gentleman's veracity, and the accuracy of his memory—he said: "I may have marked some of those I sold to these witnesses with the word "*Gem*" if ordered to do so by customers. I should not have so marked them unless specially ordered. I do not say I ever did so mark them; I do not think I was ever asked to do so." That was a man who swore in his affidavit he did mark them when he was required to do so, and

when brought to the test of cross-examination he was bound to admit he never did it at all, and never was asked for it. I can have no doubt whatever, upon the evidence of Mr. *Wilkinson*, that he designedly committed a fraud upon *Arbenz*, whose customer for some time he was, by using the word "*Gem*," and applying it to guns which had not been selected by *Arbenz*, knowing perfectly well, as he admitted, that *Arbenz* was the first person who used the word "*Gem*" in connection with the guns, and that he had never seen a gun, with the exception of that which had "*Gem*" and "1877" upon it, with the word "*Gem*" upon it, or knew the word "*Gem*" applied to any guns until *Arbenz* so applied it.

Then that opponent put in the affidavits of a very great number of witnesses who said they had bought guns from him which they called "*Gem*" guns, and then, on the ground that he himself had been selling behind *Arbenz*' back a number of guns not obtained from *Arbenz* under the name of "*Gem*," which he had never dared to put upon the guns, he sought, mainly on that ground, to induce the Court to hold that the word "*Gem*" had been so well known in the trade as descriptive of a particular shape of gun, that it ought not now to be registered. That argument came to this:—"I, knowing perfectly well that I had no right to use the word, and that it was a name which had been selected and applied by a rival tradesman, have, behind the back of that tradesman, and in fraud of him, been selling other guns than those selected by that tradesman under this name '*Gem*'; and I say I have carried on that fraud to such an extent that the name has become a common name." If he expected me to listen to an argument of that kind with anything like approbation, all I can say is I did not and I cannot allow a man, who admitted in the plainest way the fraud upon *Arbenz*, to make use of his own fraud to prevent *Arbenz* registering this trade-mark. When it was first introduced the Act of 1883 had not been passed, and under the previous Act it could not be registered, because a fancy name was not a thing that could be registered; but after the Act had passed in 1883, not very long afterwards, the application was made to register, and the application coming under that Act, of course *Arbenz* had a perfect right to register it.

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There were other witnesses whose evidence is worth notice. Mr. *Smyth*, who was either manager or traveller for *Osborne & Co.* admitted that *Arbenz* was the only man who ever put "*Gem*" on the guns. *Redman*, who was a purchaser from *Arbenz*, in August, 1882, ordered guns from *Arbenz;* and then, in 1883, for the first time, sold others which he imported from *Liége*.

Mr. *Buck*, who was a manager of the stores referred to, said he purchased guns imported from *Germany* as "*Gem*" guns in 1884, but not before. Before 1884 he obtained guns from *Arbenz* direct. Then *Jeffrey*, the man who informed *Wilkinson* about the gun which was marked "*Gem:* 1877." He did not produce the gun, but spoke of it merely from his recollection; and he said that, according to his recollection, it was a gun of English make, and there was a gilt label fastened on the gun, and the words "*The Gem:* 1877" were painted on the gilt label. That was the only evidence as to that gun. He, being the manager of Messrs. *Cogswell & Harrison*, said that they bought the guns in 1882 from *Arbenz*, and verified a remarkable memorandum, W. J. 1, which was written by him, I think, in which he wrote this to *Arbenz* on the 8th of June, 1883: "Send up with things on order half dozen No. 1 '*Gem*' springs; two only No. 1 '*Gem*' guns. Kindly give our orders your prompt attention, otherwise we shall be driven to sell the imitation '*Gem*' guns, which we can obtain any number of." When he was asked what he meant by that, he said, "Guns made at *Liége*." So that he, a manager of a well-known firm of gunmakers in *London*, was perfectly well aware that the guns made in *Liége* were not the real "*Gem*" guns, but imitation "*Gem*" guns. If I wanted evidence to shew what the state of knowledge of the trade was in the month of June, 1883, could I have better evidence than that which was supplied to me from the enemy's camp, for that gentleman was a witness for Messrs. *Osborne & Co.*

Those, I think, are the only parts of the evidence I need particularly refer to. In my opinion the opposition fails entirely, and I direct the registration of the trade-mark, and order the Opponents to pay the costs.

T. F. M.

The order thus made by Mr. Justice *Kay* was passed and

entered on the 11th of August; and the Comptroller registered the word "*Gem*" as the trade-mark of the Applicant *Arbenz* for air-guns in Class 19.

After it had been registered, viz., on the 3rd of November, 1886, Messrs. *Osborne & Co.*, the Opponents, gave notice of motion by way of appeal from the decision of Mr. Justice *Kay*, and the appeal came on for hearing on the 4th of March, 1887.

Aston, Q.C., and *Macrory*, for the Appellants.

W. Pearson, Q.C., and *Willis Bund*, for the Respondent:—

We take the preliminary objection that this is not an action, and, accordingly, under Order LVIII., rules 9 and 15, the time for appealing (except by special leave of the Court) is twenty-one days from the date when the order was signed and entered. The appeal is therefore too late.

Aston, Q.C., and *Macrory*:—

This is an important case, in which both sides are ready to argue the case upon the merits, and the Court can grant special leave now, and by so doing will relieve the Appellants from the necessity of taking proceedings to rectify the register under sect. 90 of the Act of 1883.

THE COURT (*Cotton*, *Lindley*, and *Lopes*, L.JJ.) then gave special leave upon the Appellants undertaking not to take proceedings to rectify the register upon the ground of the mark being improperly on the register.

The argument then proceeded.

Aston, Q.C., and *Macrory*:—

At the time of the application for registration, "*Gem*" was a word in common trade use as descriptive of a particular kind of air-gun, and was not merely a word descriptive of or attached to a particular sort of gun manufactured or selected by the Applicant: *Singer Manufacturing Company* v. *Loog* (1). Moreover it is not "a fancy word" within the meaning of the *Trade Marks Act*, 1883, s. 64, sub-s. 1, cl. (*c.*), for it is a term used to denote a quality, *i.e.*, that of excellence, in a variety of things: *In re Van*

(1) 8 App. Cas. 15, 27.

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Duzer's and Leaf's Trade-marks (1); and it is certainly not a fancy word "not in common use;" for it has been in common use in the trade for some years. In any case the delay on the part of the Applicant in vindicating his alleged rights is fatal to his claim: *Orr-Ewing* v. *Johnston* (2).

W. Pearson, Q.C., and *Willis Bund*, for the Respondent *Arbenz*:—

The word "*Gem*" is descriptive only of the air-gun for which *Arbenz* has registered it. As applied to air-guns it is purely "a fancy word not in common use." It has never been recognised in the trade as denoting air-guns of a particular pattern, but, except so far as the user has been fraudulent has been applied to guns of the Applicant's make or selection only; and adverse user when fraudulent will not make the word or mark *publici juris*: *In re Heaton's Trade-mark* (3). But the question whether or not it is a fancy word within the 64th section is one which cannot now be considered by the Court. Under the 62nd section of the Act of 1883 the power of deciding whether a mark is a trade-mark or not is given to the Comptroller, and as he has decided in this case that the word "*Gem*" is a good trade-mark, and has placed it on the register as such, the Court has no jurisdiction under the Act to consider its validity. In *In re Trade-mark* "*Normal*" (4) it was held that under sect. 62, sub-sects. 4 and 5, when the Comptroller has refused to register a trade-mark the Court has no jurisdiction to hear an appeal from such refusal unless the Board of Trade has referred the appeal to the Court. This limitation of the jurisdiction is borne out by sect. 90, which is confined to expunging or varying the entry on the register of the name of any person aggrieved; and, accordingly, when once a mark has been admitted as a good mark the Court has no jurisdiction to reverse the decision of the Comptroller.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay*, who, notwithstanding the opposition of *Charles Osborne & Co.*, directed

(1) 34 Ch. D. 623.
(2) 13 Ch. D. 434; 7 App. Cas. 219.
(3) 27 Ch. D. 570.
(4) *Ante*, p. 231.

that the word "*Gem*" should be registered as the trade-mark of *Adolph Arbenz* for air-guns.

The first point I will consider on this appeal is one raised by Mr. *Willis Bund*. He says that the Comptroller is the sole and absolute judge whether a word is capable of being registered as a trade-mark, subject only to the right of appeal, if he refuses to register a trade-mark, to the Board of Trade, who may refer the question to the High Court; and that if the Registrar admits a particular word, which an applicant wishes to register as his trade-mark, on the register, that is conclusive, and prevents anyone from afterwards questioning the registration of the word. That certainly is rather a strange proposition. We have already decided that when the Comptroller says to an applicant: "I, in my discretion, think that this is not what ought to be registered as a trade-mark," that is conclusive against the applicant subject to this, that there may be an appeal to the Board of Trade, and that the Board of Trade, if they think it is a matter which involves questions of law or of fact, which ought to be decided by the High Court, may remit the question to the High Court. But it is an entirely different thing to say that where the Comptroller, *ex parte*, on a *primâ facie* case being made out to him, has admitted the trade-mark for registration—that his decision is to bind every one who may be interested in saying that the mark is not a proper subject of trade-mark, or for certain reasons ought not to be registered as a trade-mark. In order to induce us to come to that conclusion we should require very strong words in the Act of Parliament giving to the Comptroller the absolute and conclusive right to decide such a question.

A very obvious illustration arises in this case. A great deal of the argument has been that on the evidence the word "*Gem*" has become descriptive of a particular species of air-gun, and that therefore it ought not to be registered. Now if it is the case that the decision of the Comptroller, who has had no opportunity of looking at the evidence, is to be absolute on questions which require the production of evidence in order to enable the Court to decide how the matter stands, that would, in my opinion, be a most inconvenient result. Because it would be a strange thing

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that Parliament should prevent any of Her Majesty's subjects who are aggrieved by a decision come to by the Comptroller upon a matter before him from bringing before the Court all those circumstances which may enable the Court to decide that the Comptroller has wrongly exercised the discretion given to him by the Act; and in my opinion the Comptroller has no such power.

Then it is said that the objection is taken under and comes before the Court under sect. 69, and in such case that the only questions which can be considered by the Court are the rights as between the applicant and the opponent, treating that which has been registered as properly registered, subject to any question of right as between the applicant and the opponent.

Unquestionably sect. 69 does apply to any question as between the applicant and the opponent, but in my opinion it is not confined in that manner. When such an application is made, and opposed by a competent person having a *locus standi*, then, in my opinion, the Court must go into the entire question involved in the objection which has been raised, and that view is supported by the end of the 4th sub-section of sect. 69, which provides that "thereupon the case shall be deemed to stand for the determination of the Court." There being, then, nothing in the Act to confine the consideration of the Court to questions which can be dealt with on the assumption that the trade-mark is properly registered as such, in my opinion we ought to enter into and determine all questions which arise upon the objections.

It was contended that sect. 90 assists somewhat the construction for which the Respondent contends, because it was said what can be done by the Court under that section is confined to altering the name on the register. Now that section was to some extent considered by us in the case of *In re Trade-mark "Normal"* (1), and I certainly then expressed an opinion that under that section the Court might strike out a mark which had been improperly registered, in the sense of being a mark which was not capable of being registered as a trade-mark under the Act; and I do not think that was opposed by the Attorney-General, who argued the matter before us. But in my opinion, although the 90th section

(1) *Ante*, p. 231.

does point to a name being struck out which is not properly on the register, it also enables any entry improperly made in the register to be struck out on a proper application.

When under sect. 69 any question comes before the Court, the Court is bound to enter into all the considerations which must be determined in order to see whether the particular mark or word is rightfully on the register. Now what have we here? The word in question is "*Gem*," and it is to be registered as regards air-guns. And looking at the Act of Parliament, does it allow the word "*Gem*" in the circumstances of this case or generally to be registered as a trade-mark? In my opinion it does not. [His Lordship then stated the facts of the case shortly and continued:—] The Applicant contends that by the name of "*Gem*" this gun of his selection was pointed out and identified as a gun which he had introduced. It is very true he had introduced it, but in my opinion the use of the word "*Gem*," whether in the advertisements or otherwise, was not pointing to a gun sold by him but as indicating a special form of gun. It is very true that he was the first person who introduced that gun and gave it the name, but by the use of years that name has become a descriptive term of the class of gun. It appears that the gun has been ordered as the "*Gem*," not simply as a gun to be bought from the Applicant, because those who sent orders to him did not send orders simply for "one of your guns;" they said, "send me two of your '*Gems*';" and in one case *Osborne* when ordering guns from the Applicant said, "Have you got an air-gun which will shoot better than the '*Gem*,' I mean stronger." That shews clearly that the Applicant was selling this gun as a particular gun, the "*Gem*"; and we know that it was a slight improvement on a gun which had been previously sold under the name of the "*Junior*"; being, I think, lighter in the bore and being of a different construction in the way of closing the breech. In my opinion, therefore, even looking at the evidence of the Applicant, the word "*Gem*" was descriptive of a gun which was pointed out by that name, and was not descriptive merely of a gun which was sold by the Applicant. We have no evidence whether or not he sold any other air-guns, but the evidence is all directed to this particular form of air-gun; and the orders which

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were produced were orders for a particular description of gun, and not only orders for a gun specially selected by the Applicant.

It is said that the Applicant selected these guns. Now there is a little ambiguity in the word "selected." It is not true, as I understand, that all the guns of this make were specially selected by him from time to time. He originally selected this as a good air-gun, as I suppose it was. Then he got a contract with the people in *Germany* that they would only supply him, and that all their exports to *England* should be sent to him. The gun may have been a very valuable thing, but when he had once introduced it and given it that particular name, in my opinion, unless he had already protected himself by taking to himself the exclusive right to use that name, he could not prevent such persons as could get this gun from abroad or get it made in *England*, from selling it by the name which the Applicant had given to it. It would have been different if at the time when he introduced this gun he had been able at once to have registered this word as his trade-mark, but he could not do so.

He could not do it until the Act of 1883 came into operation, that is to say, on the 1st of January, 1884. By that time his gun had become known by this name which he had given it.

It would have been a very different case if, independently of the *Registration Act*, we were considering this under, what I may call, the old common law of the Court of Chancery, and the guns sold by *Osborne* had been stamped "*Gem*" so as to be made to look like the guns of the Applicant; but that is not what *Osborne & Co.* are doing; what they are doing is this, they are advertising to be sold as "*Gems*" guns exactly of the same pattern which the Applicant is selling under that name; and, in my opinion, *Osborne & Co.* have a right to do that, for they are not passing off their guns as guns which are introduced by the Applicant or are imported by the Applicant, when in fact they are not so, but they are merely using the advertisement to point out what particular class of guns they can offer to their customers.

In my opinion, therefore, as regards the registration of this word "*Gem*," there is this fatal objection to it—that it is a word which in August, 1884, had become descriptive of a particular make and class of gun. Therefore it cannot be considered a

"fancy word." And, independently of that, I am bound to say that, in my opinion, in the modern usage of the word "*Gem*" it practically has ceased to be a fancy word. It would originally in the English language, as applied to guns, be undoubtedly considered as a fancy word; but we know how many words get what one may call a slang meaning, and we frequently hear things spoken of as "gems," not as indicating that they are in any way connected with precious stones or jewels, but that they are very good. Curiously enough, reading a letter in the newspaper yesterday after I left the Court I found a couple of dogs a sportsman was using referred to as "gems." That was an example of the use of the word "gem." I do not decide this case on that, because I think there is quite sufficient on the evidence here to decide it on another ground, namely, that this word at the time when the application for registration was made had become descriptive of a particular class, that is, of a particular make of gun, and not of the guns of the Applicant. In my opinion, therefore, the decision must be reversed.

LINDLEY, L.J.:—

I am of the same opinion. Whether, speaking generally and apart from the evidence, the word "*Gem*," as applied to air-guns, could be registered as "a fancy word not in common use" appears to me, I confess, more doubtful than it does to the other members of the Court. But in this particular case the evidence shews conclusively that the word "*Gem*" was not a fancy word in August, 1884, when Mr. *Arbenz* sought to register it, even as applied to air-guns. The evidence, to my mind, is clear and strong and really all one way, that the word denoted a particular pattern of gun by whomsoever made. It did not denote a particular pattern of gun which was made and sold exclusively by *Arbenz* in this country. It was a particular form of air-gun, with a particular form of charging and locking, whether made in *Frankfort*, *Liége*, or anywhere else. I am quite satisfied by the evidence that a particular kind of gun was known in the trade as a "*Gem*" air-gun. That appears to me to dispose of the whole difficulty in this case so far as the use of the particular word goes.

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I do not see the hardship to Mr. *Arbenz*. If Mr. *Arbenz* had introduced this word and used it before the 13th of August, 1875, he could have registered it under the last clause of sect. 64 of the Act of 1883, but he did not begin to use it until August or September, 1881, and he cannot, therefore, register it under the clause to which I am referring; and, having regard to the evidence as to the date of the first use of this word, he does not succeed, in my opinion, in bringing himself within the section of the Act of Parliament which alone would enable him to register it.

Now with respect to the point made by Mr. *Willis Bund*, that it is not competent for the Court to go into this question, I am bound to say I cannot agree with him at all. It appears to me that he has put upon the expression "the case" in sect. 69, too narrow a construction. The language of the section is, "thereupon"—that is, after a summons, and so on—"the case shall be deemed to stand for the determination of the Court." Mr. *Willis Bund* is asking us to put a construction upon that expression "the case" which would lead to endless confusion. He is asking us to say that it is not the case, but a portion of the case, which is to stand for the determination of the Court; and the consequence of adopting that conclusion, as was candidly admitted, would be that we shall be precluded from doing what is right upon evidence, simply because the Comptroller has done what he thought was right without evidence, a state of things which would be utterly intolerable. I have no doubt whatever that on the true construction of sect. 69 the whole case is properly before the Court, and that being so, and the conclusion at which I have arrived from the evidence being what it is, I have no hesitation in saying that, in my opinion, this appeal ought to be allowed.

LOPES, L.J.:—

A point was taken with regard to the jurisdiction of the Court. It was said that the Comptroller having admitted this word "*Gem*" to be placed on the register, the Court has no jurisdiction to decide whether the word was a proper word to be placed on the register or not, because the question was a matter entirely for the discretion of the Comptroller, and his discretion cannot be

questioned in any proceedings under sect. 69 of the Act of 1883. In my opinion this objection cannot prevail. I think in a case of opposition to registration the Court has power to deal with the whole matter and may determine whether the trade-mark in question is good or not. Otherwise this consequence would follow, that however wrongfully the Comptroller had exercised his discretion there would be no remedy, and the word must be held entitled to remain on the register in any proceeding under sect. 69.

But I now proceed to deal with a more important question in the case, and that is with regard to the word "*Gem.*" Is it a trade-mark under sect. 64 of the Act of 1883? The rule, in my opinion, is that where a name or word was originally, or has come to be, descriptive of the article to which it is attached, so that while indicating what the article is, it does not connect that article with any particular manufacturer, such name or word cannot be protected or registered as a trade-mark.

To determine whether this word "*Gem*" comes within the law as I have stated it, it is necessary to consider the evidence in this case.

The evidence is voluminous, and in many particulars in conflict. It is given, it is to be recollected, by witnesses from different parts of the country. I do not propose to go through the evidence. I will content myself with stating what I believe to be its effect with regard to the word "*Gem.*" In my opinion it shews that at the time of registration the word "*Gem*" had become descriptive of a particular form and pattern of air-gun, and did not connect that pattern with any particular manufacturer. Air-guns of the particular pattern were so universally known, according to the evidence, as "*Gems*" that a person requiring one would ask for a "*Gem,*" and would have it delivered to him without any further indication of what he required, or without any mention of the name of any particular manufacturer. I think, therefore, that the result of the evidence is that the word "*Gem*" has become descriptive within the rule as I have stated it. It is also contended that the word "*Gem*" was not a fancy word. It is not necessary in this case to decide that point, but I do not hesitate to say that in my opinion the word "*Gem*" comes

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within the decision of this Court recently delivered, I mean in the cases of *In re Van Duzer's Trade-mark*, and *In re Leaf, Sons, & Co.'s Trade-mark* (1). I think, whatever it may have been originally, it is not now a fancy word. I think it indicates commendation of the article, and is therefore descriptive, and not a fancy word within this section.

Another point was raised: that it was not a word in common use. I do not express any opinion with regard to that matter. In this case it is not necessary to do so, and I should desire to have further opportunity of consideration before I determined the matter.

I think, therefore, that this appeal ought to be allowed.

Solicitor for the Applicant: *J. S. Salaman.*

Solicitors for the Opponents: *Robinson, Preston & Stow*, agents for *Pointon, Birmingham.*

W. W. K.

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In re CROSLEY. MUNNS *v.* BURN.

[1886 C. 2053.]

Arrangement with Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 28 —*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 15 [*Revised Ed. Statutes, vol. xvi., p.* 117]—*Debt incurred by Fraud—Statute of Limitations.*

C., a broker, sold without authority bonds left with him by *A.*, a customer, for safe custody, and misappropriated the proceeds. *C.* became bankrupt, and the sale being then discovered *A.* proved for the value. The creditors passed a resolution under the *Bankruptcy Act*, 1869, s. 28, accepting a proposal that *T.*, a friend of the bankrupt, should pay a composition of 6*d.* in the pound on all the debts in full discharge thereof, and that on such payment the bankruptcy should be annulled. *A.* received the composition, but did not otherwise assent to the arrangement. In August, 1880, the bankruptcy was annulled. In May, 1886, an order in the Chancery Division was made for administration of the estate of *C.*, who had died in the interval:—

Held, that the debt due from *C.* to *A.* was incurred by fraud within the meaning of sect. 15 of the *Debtors Act*, 1869; that sect. 15 applied not only to compositions and arrangements under sects. 125 and 126 of the

(1) 34 Ch. D. 623.

Bankruptcy Act, 1869, but to arrangements under sect. 28, and that the debt therefore was not discharged by the arrangement:

Held, also, that as the debt was incurred by fraud which was not discovered till after the adjudication, and an action could not be brought while the bankruptcy was in force, the *Statute of Limitations* did not begin to run till the bankruptcy was annulled, and as an order for administration was made within six years from that time, *A.* was entitled to prove in the administration for the unpaid part of his debt.

Decision of *Bacon*, V.C., affirmed.

PREVIOUSLY to 1874 Captain *Ayscough* deposited with *Crosley*, his broker, for safe custody, various securities which *Crosley* had purchased for him. On the 21st of February, 1874, *Crosley* was adjudicated a bankrupt. On the 7th of July, 1874, the trustee in the bankruptcy was ordered to make an affidavit as to which of the securities he had in his possession, and to deliver them to Captain *Ayscough*. It turned out that some were missing, and Captain *Ayscough* proved for their value. His proof was admitted at £1250. Two dividends of 6*d.* in the pound were declared in the bankruptcy, and Captain *Ayscough* received £62 10*s.* in respect of them.

On the 30th of July, 1880, the creditors of *Crosley* passed, under the *Bankruptcy Act*, 1869, s. 28, the following resolution:—

"That the sanction of this meeting be and it is hereby given, ... assenting to a general scheme of settlement of the affairs of the above-named bankrupt, proposed by *A. G. Temple*, of ———, to pay to the registrar-trustee a sum of money sufficient to pay the costs of these proceedings, and also to pay to all the creditors of the said bankrupt a composition of 6*d.* in the pound upon the amount of their respective debts (in addition to the dividends already declared under the bankruptcy) in full discharge thereof, such sum to be paid within ten days after the confirmation by the Court of this special resolution, and that upon payment of such money as aforesaid the bankruptcy of the said *E. N. Crosley* shall be annulled."

On the 10th of August, 1880, an order in bankruptcy was made: "This Court doth hereby approve the said resolution, and doth order the same to be forthwith carried into effect."

Mr. *Temple* named in the resolution paid to the registrar-trustee the sum which he had agreed to provide, and on the

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26th of August, 1880, an order was made annulling the bankruptcy.

The 6*d.* in the pound was paid, and Captain *Ayscough* received, on the 13th of September, 1880, £31 5*s.*, making in all, with the dividends he had received before, £93 15*s.* Captain *Ayscough* did not assent to the arrangement otherwise than by receiving the composition.

Crosley died on the 15th of October, 1885. On the 28th of May, 1886, an originating summons was taken out for administration of his estate, and on the 10th of June an administration order was made directing the usual account of debts.

Captain *Ayscough* sent in a claim as creditor for £1156 5*s.*, the balance of the £1250, after allowing for the £93 15*s.* By his affidavit in support of the claim he deposed that the missing securities "were in fact fraudulently sold by the said *E. N. Crosley*, and the proceeds converted to his own use." Vice-Chancellor *Bacon*, after argument, ordered the claim to be allowed.

The Defendant, the executor of *Crosley*, appealed, and the appeal was heard on the 21st of March, 1887.

A. Young, for the Appellant:—

I submit that the scheme of settlement was a discharge of all the debts. It is in terms expressed to be so, and under the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), s. 28, it must have effect according to its terms: there is no authority for introducing into it an exception of debts arising from fraud or breach of trust. Where an exception of that kind is intended it is expressed as in sect. 49. Sect. 15 of the *Debtors Act*, 1869 (32 & 33 Vict. c. 62), does not apply to an arrangement under sect. 28, but only to compositions and arrangements under sects. 125 and 126: *Ex parte Hemming* (1). Moreover, supposing the section applicable to such an arrangement as this, it only excepts debts contracted by fraud; here the debt was not incurred by fraud but only by a breach of duty.

[LOPES, L.J.:—In my opinion it was incurred by an indictable fraud. Why should the arrangement discharge a man from debts from which a discharge in bankruptcy would not release him?]

(1) 13 Ch. D. 163.

Because here the arrangement is a matter of bargain. Mr. *Temple* buys a release of the bankrupt from all debts. The Court might have imposed terms, but did not. *Gilbey* v. *Jeffries* (1) shews that the arrangement is a complete discharge. The claim in the present case is barred by the *Statute of Limitations*: *In re Greaves* (2).

Ince, Q.C., and *St. John Clerke*, for Captain *Ayscough*, were desired to address themselves to the question on the *Statute of Limitations*:—

The debt was incurred by fraud, which was not discovered till after the adjudication. The statute, therefore, could not run before the adjudication. No action could be brought while the bankruptcy was in force: *Bankruptcy Act*, 1869, s. 12; *Cobham* v. *Dalton* (3). The statute, therefore, did not run till the bankruptcy was annulled, and within six years from that time an order for payment of *Crosley's* debts was made. The *Statute of Limitations*, therefore, is no bar. [They were then stopped by the Court.]

COTTON, L.J.:—

This is an appeal from a decision of Vice-Chancellor *Bacon* allowing a proof against the estate of *Crosley*, the testator. *Crosley*, who was a broker, had shares deposited with him by Captain *Ayscough* for safe custody. He became bankrupt, and an order was made on the trustee to deliver up to Captain *Ayscough* such of them as were in his possession. Some of them had been sold by *Crosley*, and Captain *Ayscough* proved for the value of those so sold. After this an arrangement was made under sect. 28 of the *Bankruptcy Act*, 1869, which enacts that a composition made under its provisions and approved by the Court "shall be binding on all the creditors so far as relates to any debts due to them and provable under the bankruptcy." It is said that therefore this arrangement, which provides that the composition shall be received in full discharge of the debts, precludes Captain *Ayscough*

(1) 11 Q. B. D. 559. (2) 18 Ch. D. 551.
(3) Law Rep. 10 Ch. 655.

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from any further claim. This would have been so but for the 15th section of the *Debtors Act*, 1869, which enacts that "where a debtor makes any arrangement or composition with his creditors under the provisions of the *Bankruptcy Act*, 1869, he shall remain liable for the unpaid balance of any debt which he incurred or increased, or whereof before the date of the arrangement or composition he obtained forbearance, by any fraud, provided the defrauded creditor has not assented to the arrangement or composition otherwise than by proving his debt and accepting dividends." Captain *Ayscough* did so assent, but not in any other way. It was urged that this section does not apply, for that in the present case there was a general scheme of settlement, and not a composition offered by the bankrupt. It would be very singular if a scheme under sect. 28 discharged a debtor more completely than an order of discharge; but that point need not be considered, for I am of opinion that this was an arrangement within sect. 15 of the *Debtors Act*. It is true that the bankrupt had no money and could not offer a composition, but money was offered on his behalf by Mr. *Temple*, which comes to the same thing. Then it is said that sect. 15 does not apply, because this is not an arrangement under sect. 125, nor a composition under sect 126. But sect. 15 does not specifically refer to those sections, and an arrangement like the present comes within the terms of the section.

It was hardly seriously contended that the debt was not contracted by fraud. The bankrupt had without authority sold shares belonging to his customer and appropriated the proceeds to his own use. Even without the statement in Captain *Ayscough's* affidavit that the bonds were "fraudulently" sold the facts clearly shew that the debt was contracted by fraud.

Then it is said that the claim is barred by the *Statute of Limitations*. But the fraud was not discovered till after the adjudication in bankruptcy. While the bankruptcy was in force no action could be brought, so the statute could not begin to run till the annulling of the bankruptcy, and within six years from that time an order for administration was made. The *Statute of Limitations* is therefore no defence, and the appeal must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. That this was a debt incurred by fraud is plain. What, then, is the combined effect of sect. 28 of the *Bankruptcy Act*, 1869, and sect. 15 of the *Debtors Act*, 1869, for the two must be looked at together? Mr. *Young* asks us to put too narrow a construction on sect. 15 when he contends that this was not a composition or arrangement within the meaning of that section. I can see no reason for confining the expression to compositions or arrangements under sects. 125 and 126.

The short answer to the argument founded on the *Statute of Limitations* is that the statute did not begin to run till the bankruptcy had been annulled.

LOPES, L.J.:—

It is contended for the Appellant that the arrangement under sect. 28 discharged the bankrupt from all his debts, and, having regard to the words at the end of the section, I think that would be so but for sect. 15 of the *Debtors Act*, 1869. It is said that this section does not apply to a composition under sect. 28, but only to compositions and arrangements under the sections relating to composition and liquidation. In my opinion the operation of the section ought not to be so restricted, but the enactment ought to be held to apply to any arrangement between the debtor and his creditors under the *Bankruptcy Act*, 1869. For the reasons which the Lords Justices have given the *Statute of Limitations* is no bar to the Respondent's claim.

Solicitors for Appellant: *John Holmes & Son.*
Solicitors for Respondent: *Leathley & Phipson.*

H. C. J.

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Feb. 3.
C. A.
March 24.

In re WICKHAM.
MARONY *v.* TAYLOR.

[1885 W. 1312].

Practice—Staying Proceedings—Unpaid Costs—Contempt—Pending Summons.

Although mere non-payment of the costs of an interlocutory motion, which a plaintiff has been ordered to pay, is not *per se* sufficient ground for ordering further proceedings in his action to be stayed, in cases where the party is acting vexatiously in withholding payment of costs, there is jurisdiction, upon application by summons, to stay proceedings until he has complied with the order for payment.

In re Neal (1) and *In re Youngs* (2) questioned.

Pending a summons before *North*, J., to whose Court the action was attached, to stay all further proceedings until the Plaintiff should have paid the costs which he had been ordered to pay, the action, at the Plaintiff's instance, came on for trial before *Kekewich*, J., to whom it had been transferred for trial only. Defendant having taken the preliminary objection that the costs in question had not been paid, *Kekewich*, J., ordered the trial to stand over generally, with liberty to Plaintiff to restore the action to the paper on payment of the costs:—

Held, that the order ought to have postponed the trial, not until the costs should have been paid, but until the summons before *North*, J., should have been disposed of:—

Held, also that *North*, J., had in the circumstances, rightly upon the summons ordered proceedings to be stayed until the Plaintiff had complied with the order for payment of costs.

APPEAL by Plaintiff from an order of Mr. Justice *North* of the 3rd of February, 1887, staying all further proceedings in the action until the costs of an interlocutory motion had been paid by the Appellant; and also from an order of Mr. Justice *Kekewich* of the same date, postponing the trial of the action until such costs were paid, and ordering the Plaintiff to pay the costs of the day.

The action was brought in April, 1885, by Plaintiff, claiming to be a legatee under the will of *William Wickham*, deceased, against the sole surviving executor and trustee of the will, alleging breaches of trust and claiming administration of the estate and the appointment of a receiver.

(1) 31 Ch. D. 437. (2) 31 Ch. D. 239.

On the 12th of June, 1885, the Plaintiff moved for the appointment of a receiver, and his motion was refused with costs by the late Mr. Justice *Pearson*.

These costs were taxed at £37 9*s*. 4*d*., but had not been paid by the Plaintiff. The Defendant's solicitor threatened to issue execution, but finding that the Plaintiff was a man without means execution was not issued.

Notice of trial was given on the 19th of November, 1885, but negotiations for a settlement of the action were for some time pending, and the trial of the action was from time to time postponed. On the 24th of January last, upon hearing that the Plaintiff's original solicitor, who had been changed in December, 1885, was again acting for him, the Defendant took out a summons in Mr. Justice *North's* Chambers that all further proceedings in the action might be stayed until the amount of the taxed costs payable under the order of the 12th of June, 1885, should have been paid.

This summons was on the 27th of January, at the request of the Plaintiff, adjourned to the Judge and stood for hearing on the 3rd of February. The action was thereupon marked with the words "summons pending," the effect of which was that the action would not be in the paper for trial until the summons was disposed of.

The Plaintiff objected to having this mark placed against the action, and got it removed, and the action came on for trial before Mr. Justice *Kekewich* on the 3rd of February, when Defendant's counsel took the preliminary objection that the Plaintiff was in contempt for not having complied with the order for payment of costs, and that all further proceedings by Plaintiff ought to be stayed until such costs were paid.

C. E. E. Jenkins, in support of this contention cited *In re Neal* (1) and *In re Youngs* (2).

Oswald, and *Pochin, contrà*, contended that the objection was taken too late: *Pooley's Trustee* v. *Whetham* (3); that proceedings could not now be stayed for non-payment of costs except

(1) 31 Ch. D. 437. (2) 31 Ch. D. 239.
(3) 33 Ch. D. 76.

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where an action had been discontinued under Order xxvi. r. 4; that *In re Neal* (1) and *In re Youngs* (2) were contrary to the practice and wrongly decided; and that in the Queen's Bench Division it was not the practice to stay the proceedings on account of failure to pay costs: *Morton* v. *Palmer* (3).

Kekewich, J.:—

The preliminary objection which is here taken raises an important question of practice. The same question is raised by a summons which is to be heard to-day before Mr. Justice *North*. I cannot hear that summons, and the point for decision is whether the question is as well raised by preliminary objection at the trial as by summons. Of the merits of the case I know nothing, but it seems that the Plaintiff was advised to raise the question of a receiver by a motion. The motion was heard on the 12th of June, 1885, and was refused with costs. These costs not having been paid, the Defendant now takes the preliminary objection that the Plaintiff cannot proceed until he has paid them. I at first thought that this was not open to him, but I had not noticed the case of *In re Neal* with the attention which it deserves. There a preliminary objection was raised at the trial that the plaintiff was in contempt, and could not proceed, and Vice-Chancellor *Bacon* held the objection to be good. Mr. *Oswald* has argued that both Vice-Chancellor *Bacon* and Mr. Justice *Pearson* (in *In re Youngs*) were in error, because imprisonment for non-payment of costs is abolished, but I do not know that a man is less in contempt because he cannot be imprisoned. As to the argument of delay, I find that Vice-Chancellor *Bacon* disposes of it in this way (4): "To say that the defendants are in default in not having applied for payment earlier, does not lie in the mouth of the plaintiff, because the defendants might very fairly have been expecting all this time to receive payment of the £55 19*s*., and indeed that the order would be obeyed even at this the last moment." Here the Plaintiff has had a much longer time in which to pay. The real argument is that *In re Neal* established a new practice, but I find that Vice-Chancellor *Bacon*

(1) 31 Ch. D. 437.
(2) Ibid. 239.
(3) 9 Q. B. D. 89.
(4) 31 Ch. D. 439.

says that the practice is already established—and I take that from him—I agree that it is a wholesome practice and it is a convenient one, and I follow it. Twelve months have elapsed since that decision, and I do not find any case suggesting that it was wrong. I agree that when a point has not been established then each Judge is at liberty to follow his own opinion; but this has been established for a year, and Mr. Justice *Pearson* evidently thought that some such practice should be adhered to. I am asked to recognise in *Morton* v. *Palmer* (1) the decision of two Judges that *In re Neal* (2) was wrongly decided. I do not see that the judgment says so. Mr. Justice *Cave* goes into the practice, and I think shews that he would have decided *In re Neal* in the same way as Vice-Chancellor *Bacon*, and he does not say a word against the rule then adopted. I do not see any difference between the equity and common law practice. I am referred to Order XXVI., rule 4, but I think the rule is directed to a particular case; it speaks only of the failure to pay the costs of a discontinued action. Order XLIX., rule 2, shews what is the limit of my jurisdiction, and that I have no power to stay proceedings in the action, but I shall postpone hearing it until the Plaintiff has complied with the order to pay costs, and he must pay the costs of the day.

The order as drawn up was that the trial of the action should stand over generally, with liberty to the Plaintiff to restore the action to the paper on payment of the said costs of the motion of June, 1885, and that the Plaintiff do pay to the Defendant his costs of the day.

Subsequently on the same day Mr. Justice *North* made an order in Chambers upon the Defendant's summons that all further proceedings in this action be stayed until the costs payable under the order of the 12th of June, 1885, should have been paid.

The Plaintiff having appealed from the order of Mr. Justice *Kekewich*, the Court of Appeal on the 2nd of March, 1887, being of opinion that they could not conveniently deal with the appeal without the order of Mr. Justice *North* (which at that time was not drawn up), gave liberty to the Plaintiff to amend his notice

(1) 9 Q. B. D. 89. (2) 31 Ch. D. 437.

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of appeal so as to include an appeal against the order of Mr. Justice *North*.

The appeal from both orders now (the 24th of March) came on.

Oswald, and *Pochin*, in support of the appeal:—

We submit that *In re Neal* (1), on which Mr. Justice *Kekewich* relied, is opposed to the established practice that a plaintiff is not estopped from asserting his rights merely because he is in default for non-payment of costs: *Ricketts* v. *Mornington* (2); *Wilson* v. *Bates* (3); and stands alone in deciding that a stay of proceedings can be obtained at the hearing or trial of the action without the necessity of a motion or summons for the purpose: *Daniell's* Chancery Practice (4). The old rule of the Court of Chancery, which was founded on the doctrine of contempt, was that if the costs unpaid were costs of an application which went to the whole root of the action, then such costs must be paid before the plaintiff could make another application for the same purpose: *White* v. *Bromige* (5): *Bradbury* v. *Shawe* (6); but there is no authority for the proposition that when the costs are in respect of a merely interlocutory application the whole action must be stayed until the costs have been paid. Even when the costs unpaid are those of a former litigation the jurisdiction will be exercised sparingly, and there is no general rule that until payment the proceedings in a second action must be stayed: *Cobbett* v. *Warner* (7); and it would be "entirely contrary to justice that, without being at liberty to exercise any discretion whatever in the matter, the Courts should be compelled to say that a man who may have a just claim should be prevented from pursuing it further because he may be unable to pay the costs of some interlocutory proceeding in which he may have failed perhaps from no fault of his own:" *Morton* v. *Palmer* (8). *In re Youngs* (9) was also relied upon, but there the summons was taken out promptly; here there has been a delay of eighteen months, which is fatal to the application: *Pooley's Trustee* v. *Whetham* (10);

(1) 31 Ch. D. 437.
(2) 7 Sim. 200.
(3) 3 My. & Cr. 197, 202.
(4) 6th Ed. p. 1943.
(5) 26 W. R. 312.
(6) 14 Jur. 1042.
(7) Law Rep. 2 Q. B. 108.
(8) 9 Q. B. D. 89, 91.
(9) 31 Ch. D. 239.
(10) 33 Ch. D. 76.

Mayor of Saltash v. *Goodman* (1). And in assuming that a party who had made default in payment of costs was in contempt, and accordingly that further proceedings in this action could be stayed until such costs have been paid, *In re Youngs* (2) was, we submit, wrongly decided. Even under the old practice a party who had failed to pay costs was not in contempt until the subpœna was issued; and as the subpœna for costs is now abolished, Order XLIII., rule 7, there is no longer any contempt for non-payment of costs. The jurisdiction to stay proceedings for non-payment of costs is limited by Order XXVI., rule 4, which is exhaustive, and cannot be enlarged by the authority of individual judges, to the costs of a discontinued action for the same cause of action; and no additional jurisdiction to stay proceedings is given by the *Judicature Act*, 1873, s. 24, sub-s. 5, which deals with prohibition and injunctions against proceedings in other Courts, and is not aimed at a mere stay of proceedings. If the provisions of previous Acts in reference to costs have been abrogated by the *Judicature Acts* and Rules: *Garnett* v. *Bradley* (3); *Snelling* v. *Pulling* (4), *à fortiori* the former have been repealed by the new rules of practice. As the Judge to whom the action had been transferred for trial only, Mr. Justice *Kekewich* had no jurisdiction to order further proceedings to be stayed: *Robinson* v. *Chadwick* (5); and in any case such an order could only be made upon summons: *Eden* v. *Naish* (6).

Chadwyck Healey, and *C. E. E. Jenkins*, for the Defendant:—

[COTTON, L.J.:—How was it that pending the summons the action came into the paper?]

The Plaintiff objected to the action being marked with the words "pending summons" and procured the removal. But for the course taken by the Plaintiff the action would not have come into the paper until the summons had been disposed of.

[COTTON, L.J.:—How was it that the Defendant did not take out his summons in respect of the costs ordered to be paid in June, and taxed in July, 1885, until January, 1887?]

(1) 43 L. T. (N.S.) 464.
(2) 31 Ch. D. 239.
(3) 3 App. Cas. 944.
(4) 29 Ch. D. 85.
(5) 26 W. R. 421.
(6) 7 Ch. D. 781.

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The delay, which has in no way prejudiced the Plaintiff, is explained by the negotiations which were from time to time pending with a view to a settlement of the action; and as late as the 8th of January last Defendant's solicitors were requested by telegram not to deliver briefs. On the legal question, the old practice that any proceedings which were being prosecuted by a party who was in contempt for non-payment of costs would be stayed until the contempt has been cleared by paying the money has not been altered in any way by the *Judicature Acts* or Rules: *In re Youngs* (1); *In re Neal* (2). *Morton* v. *Palmer* (3), as pointed out by Mr. Justice *Pearson* (4), is clearly distinguishable, and is no authority for the proposition that there is no jurisdiction in the Chancery Division to stay proceedings in an action until the party has complied with the order or has to pay costs. If the exercise of the jurisdiction is a matter of discretion, we submit that the action is of a vexatious and useless character, and this was clearly the view of Mr. Justice *Pearson* when he refused the motion for a reconsideration with costs.

Oswald, in reply.

COTTON, L.J. (after stating the facts, proceeded):—

As there was at the time a summons pending before Mr. Justice *North*, Mr. Justice *Kekewich* did not in my opinion take quite the right and proper course in ordering the hearing of the action to stand over generally until the costs were paid, because when he was informed of the pending summons it was his duty to have said it would be wrong for him to try the action, having regard to that summons, until it was disposed of by Mr. Justice *North*. But the form of the order practically made no difference in the result, except as to the costs of the day which the Plaintiff was ordered to pay. The question of costs ought also to have been made to abide the result of the summons. It appears, however, that at some time the action was marked with the words "pending summons," and I understand, upon inquiry, that until that note against the action was removed it could not have

(1) 31 Ch. D. 239.
(2) Ibid. 437.
(3) 9 Q. B. D. 89.
(4) 31 Ch. D 240.

come into the paper. The note was removed at the Plaintiff's instance, and it was entirely from the course taken by the Plaintiff or his solicitor that the case came into the paper before Mr. Justice *Kekewich*. It was strongly urged upon us that we ought to lay down that responsibility would have been incurred by the solicitor to his client if he had allowed the note to remain against the action. But in my opinion the solicitor would have incurred no responsibility in allowing the mark to remain, though he may have in removing it. I think therefore that the Plaintiff would have been rightly ordered to pay the costs of the day if Mr. Justice *Kekewich* had been told the facts. Now I must say that I do not agree with the course taken by Vice-Chancellor *Bacon* in *In re Neal* (1), where at the instance of the defendant, upon the action being called on for trial, all further proceedings were ordered to be stayed until the plaintiff had cleared her contempt by paying the costs which she had been ordered to pay. It is contrary to *Ricketts* v. *Mornington* (2) and *Wilson* v. *Bates* (3). The matter ought not to be disposed of upon an objection taken by counsel at the hearing that costs have not been paid; there ought to be an application for the purpose. In this case there was a summons actually pending before the Judge to whom the cause was attached. Was then the order of Mr. Justice *North* right in directing proceedings to be stayed until the costs of the motion should have been paid? Undoubtedly in the Court of Chancery, before the *Judicature Acts* and Rules, when a party was in contempt for non-payment of costs, there was the practice of ordering all proceedings to be stayed until such costs should be paid; and I know of no rule which confined that practice to the costs of an application going to the root of the action. Where a party was in contempt the Court on application properly made—but not at the hearing—interfered to stay the proceedings, on the ground that it would be unreasonable that a party in contempt should harass his opponent by further proceedings until he had paid what he had been ordered to pay. Then it was argued very strenuously that the old practice must be disregarded, and that the Court does

(1) 31 Ch. D. 437. (2) 7 Sim. 200.
(3) 3 My. & Cr. 197.

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not treat parties as in contempt for mere non-payment of costs. I do not look upon it from the narrow view of contempt, if that was the foundation of the old practice, but in my opinion the principle that then existed subsists still; and if the Court thinks it unreasonable that proceedings should be allowed to go on, then the jurisdiction still remains, and ought to be exercised in a proper case. Sect. 24, sub-sect. 5, of the *Judicature Act*, 1873, reserves to all the Courts generally the old power of restraining vexatious or unreasonable proceedings in any cause or matter before them, if they think fit. Then it was pressed upon us that this general power is limited by the Rules of Court to the case therein specified (Order XXVI., r. 4). But in my opinion it does not follow that the special power given by the Rules limits the inherent general jurisdiction in the Court to stay proceedings in proper cases. [His Lordship, after stating that the delay in making this application to stay proceedings, with which he had been at first struck, appeared on the facts of the case to be sufficiently explained, proceeded:—] I think that the objection of delay being removed, the order of Mr. Justice *North* was right. The costs which the Plaintiff had been ordered to pay were costs of a motion for a receiver, which was refused by Mr. Justice *Pearson*, in June, 1885, and such refusal involved the conclusion of the Court that no case of breach of trust by misapplying the rents had been established against the Defendant, and that it would be wrong to interfere with the power given to the trustees by the will. If the action went on, and the Plaintiff was unable to pay the costs, an additional burden would be thrown upon the estate. There was nothing unreasonable therefore in refusing to run this risk and in not allowing the action to proceed before the costs of the motion should have been paid. I do not say that mere non-payment of costs is enough — and if the late Mr. Justice *Pearson*, in *In re Youngs* (1), thought so, I differ from him; but in this case on the aspect of the probable result of the proceedings there is sufficient ground, having regard to the order made in June, 1885, for saying that the order of Mr. Justice *North* was right. The case must depend on its merits. I do not come to this decision on the ground of any general rule, but on the ground that the Court

(1) 31 Ch. D. 239.

ought carefully to exercise its jurisdiction, and, having regard to the circumstances of the case, stay proceedings if it thinks them unreasonable. *Morton* v. *Palmer* (1) was relied on, but I do not think that it has any bearing on this case. The Court of Appeal might have made, but did not make, payment of costs a condition precedent to granting a new trial; and though it was said that Mr. Justice *Pearson* did not in this case make payment of the costs of the motion for a receiver a condition precedent before any further steps could be taken in the action, no application for liberty to proceed was made, nor would it have been usual. As to the costs of the appeal, I had some doubt, as Mr. Justice *Kekewich's* order, as I have already stated, went too far. But the appeal from that order, while the summons before Mr. Justice *North* was still pending, was a useless appeal, and could not be dealt with until the summons had been disposed of. The order of Mr. Justice *North* was quite right, though we may not decide the case on quite the same grounds. Without that order the appeal from Mr. Justice *Kekewich* was really unnecessary; and it does not follow that an unsuccessful appellant can escape payment of costs because the case is decided against him on different grounds from those taken in the Court below. The appeal must therefore be dismissed with costs.

LINDLEY, L.J.:—

When this case came before the Court on the 2nd of March it could not be dealt with until the order of Mr. Justice *North* was before us. That appeal was useless without the other. In my opinion Mr. Justice *Kekewich* did not make the order which ought to have been made. He should have ordered the trial of this action to be postponed until the summons before Mr. Justice *North* had been disposed of; but he was right on the facts of the case, as we know them, in giving the Defendant the costs of the day. Until a comparatively recent period the only means of enforcing payment of costs in Chancery was by attachment, and as regards staying proceedings the practice in Chancery and at Common Law was different.

The distinction between different kinds of contempt is pointed

(1) 9 Q. B. D. 89.

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out by Lord *Redesdale* in *In re McWilliams* (1). Attachment was the remedy for the breach of any order, and even now, notwithstanding the *Debtors Act*, 1869, an attachment will still be granted for the non-payment of money in a proper case: *In re Freston* (2). In this case the order of June, 1885, did not put the Plaintiff in actual contempt, but there is no doubt that the old Court of Chancery, founding itself upon the theory of contempt, did frequently stay proceedings on the ground of non-payment of costs. I agree that the non-payment of costs *per se* is not ground for staying proceedings, but there is a great distinction even now between actions the costs of which come out of the estate, and ordinary actions in the Queen's Bench Division. It appears to me that under the present practice, whenever it can be shewn that a person is proceeding vexatiously in not paying costs which he has been ordered to pay, the Court has jurisdiction to stay the proceedings. This rule is, I think, applicable in all the Divisions of the Court. To hold that the Court has no power to say that an action shall not be allowed to go on until such costs have been paid would be to prevent the Court from stopping vexatious proceedings and might lead to grievous injustice. The merits of each case must be looked at; and here the consequences of the non-payment of these costs might be very serious. Further costs might be incurred, which would have to come out of the estate, and this would be a considerable hardship upon the innocent beneficiaries. The order of Mr. Justice *North* was in my opinion quite right in ordering further proceedings to be stayed until these costs should have been paid.

Appeal dismissed with costs.

Solicitors: *Geo. Johnson; Shaen, Roscoe, & Co.*

(1) 1 Sch. & Lef. 169, 174.

(2) 11 Q. B. D. 545.

F. G. A. W.

CROMPTON *v.* ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION.

C. A. 1887

March 23, 26.

[1886 C 942.]

Practice—Patent—Particulars of Objection to Patent—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 29.

The Defendant in an action for the infringement of a patent denied the validity of the patent, and stated the objection that the specification did not sufficiently describe the nature of the invention and how it was to be performed. In compliance with an order for further particulars he repeated the above objection, with the addition that the specification did not contain a sufficient direction to enable skilled workmen to make a machine having the advantages alleged by the inventor. *Kay*, J., ordered further particulars, and the Defendant appealed.

Held, by *Cotton* and *Lindley*, L.JJ., that this order ought to be affirmed, for that, if the Defendant knew of a particular defect in the specification, he ought to point it out, that the Plaintiff might not be taken by surprise.

THE Plaintiffs sued the Defendants for infringement of letters patent for improvements in dynamo-electric machines. The Defendants by their defence denied the validity of the letters patent, and par. 5 of their particulars of objections was as follows:—"The specification filed in pursuance of the said letters patent does not sufficiently describe and ascertain the nature of the said alleged invention, and in what manner the same is to be performed."

The Plaintiffs took out a summons for further and better particulars of par. 5, and on the 14th of January, 1887, Mr. Justice *Kay* made an order that the Defendants should "deliver to the Plaintiffs further and better particulars of objections shewing how and in what respect the specification filed in pursuance of the letters patent does not sufficiently describe and ascertain the nature of the alleged invention, and in what manner the same is to be performed, by reference, when necessary, to the subject matter of the said specification."

On the 3rd of February the Defendants delivered the following further particulars:—"The specification filed, &c., does not sufficiently describe and ascertain, &c., inasmuch as it does not contain a sufficient direction to enable workmen skilled in the manufacture of electrical machinery to make a dynamo-electric machine in which the electro-motive force is kept approximately

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constant at constant speed when the resistance of the external circuit varies."

The Plaintiffs again took out a summons for further and better particulars, and on the 18th of February Mr. Justice *Kay* made a second order in the same terms as that of the 14th of January. The Defendants appealed, and the appeal was heard on the 23rd of March, 1887.

J. C. Graham, for the Appellants:—

The case turns on the *Patents, Designs and Trade-Marks Act* of 1883, sect. 29, sub-sect. 2, and the Rules of the Supreme Court, 1883, Order XIX. rule 4. Our particulars are sufficient. We rely on this, that if you follow out the Plaintiffs' directions in their specification, you do not get what they claim. It is suggested that we know in what respect the specification fails; but, assuming that we do, we are not bound to tell the Plaintiffs; it is not our business to shew them how to amend their specification. All that we have to give is particulars of our defence—circumstances on which we mean to rely at the trial. What we mean to rely upon is not any particular deficiency in the specification, but the broad ground that a skilled workman cannot make the machine by it.

[LINDLEY, L.J.:—If you know in what respect the directions are insufficient to enable a workman to make the machine, ought you not to tell the Plaintiffs how they are insufficient?]

No. It is no part of our defence. It is for the Plaintiffs to prove that their directions are sufficient; it does not lie on us to prove the negative.

J. G. Butcher, contrà:—

If the Defendants know in what particulars the specification is insufficient, they ought to point them out, that we may know what case we have to meet. The case is the same in principle as *Anglo-American Brush Electric Light Corporation* v. *Crompton* (1).

1887. March 26. COTTON, L.J.:—

This is an appeal from Mr. Justice *Kay*, raising a short question. The Defendants denied the validity of the Plaintiffs'

(1) 34 Ch. D. 152.

patent, and in their particulars of objection they stated their objection to the specification as follows: "The specification does not sufficiently describe and ascertain the nature of the said alleged invention, and in what manner the same is to be performed." Mr. Justice *Kay* ordered further and better particulars to be delivered. The Defendants then delivered the same objection as before, with this addition:—"inasmuch as it does not contain a sufficient direction to enable workmen skilled in the manufacture of electrical machinery to make a dynamo-electric machine in which the electro-motive force is kept approximately constant at constant speed when the resistance of the external circuit varies." If the case had come before me in the first instance, I should have been disposed to think that this latter objection sufficiently pointed the Plaintiffs to the case which they had to meet. They would bring witnesses to say that they could make the machine from the specification. It is suggested that Mr. Justice *Kay* thought that the Defendants ought to shew the Plaintiffs, so far as they could, how the specification could be set right. I could not agree in that view, nor do I suppose that Mr. Justice *Kay* entertained it. It is possible, however, that the objector knows what particular he considers to have been omitted from the specification, the insertion of which is necessary to enable a workman to make the machine. If he does, it is better, especially having regard to the view expressed by the Judge who has to try the case, that he should point out in what respect he alleges the specification to be deficient. If he knows a particular ground of objection, it may prevent difficulty at the trial if he states what he alleges to have been omitted. If this is not done, Mr. Justice *Kay* may at the trial consider that the Plaintiffs have been taken by surprise, and direct the case to stand over. Though I think that, if I had been in his place, I should hardly have required further particulars, I cannot come to the conclusion that his decision ought to be reversed.

LINDLEY, L.J.:—

I am of opinion that Mr. Justice *Kay* was right. The Act of 1883, sect. 29, requires particulars to be given in an action for infringement of a patent. The 1st sub-section requires the

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plaintiff to give particulars of breaches; the 2nd and 3rd require the defendant to give particulars of objections, and if he disputes the validity of the patent he must state the grounds on which he disputes it. In considering this section we must bear in mind that its object is to prevent surprises at the trial. Here the Defendants by their defence say that the letters patent are void, and deliver particulars, by which they say that the specification does not sufficiently describe the nature of the invention, and how it is to be performed. Being ordered to give further and better particulars, that it may be known what they allege to be amiss, they say that the specification does not describe the machine sufficiently to enable a skilled workman to make it. Mr. Justice *Kay* says: "You must tell us more than that, if you can." Perhaps the Defendants are unable to point out anything more particularly; if so, there is an end of it. But here the Defendants do not say that they have told the Plaintiffs all they know. Certainly a defendant is not bound to shew a plaintiff how to amend his specification; but if the Defendant can point out a particular defect in it, which he intends to rely upon as rendering the patent void, I think that he ought to say what that defect is.

LOPES, L.J.:—

I was not present during the argument, and therefore give no opinion.

Solicitors for Plaintiffs: *Goodhart & Medcalf.*
Solicitors for Defendants: *Renshaws.*

H. C. J.

EDEN *v.* WEARDALE IRON AND COAL COMPANY.

[1884 E. 321.]

C. A.
1887
KAY, J.
Feb. 28.
C. A.
March 31.

Practice—Third Party Procedure—Interrogatories by Third Party—"Opposite Parties"—"Defendant"—Rules of Supreme Court, 1883, *Order* XVI., *r.* 48; *Order* XXXI., *r.* 1—*Judicature Act*, 1873, *s.* 100 [*Revised Ed. Statutes, vol. xvii., p.* 95].

Persons who are served by a defendant with a third party notice are not thereby made defendants within the definition of the word in the *Judicature Act*, 1873, s. 100, nor do they become defendants by putting in a statement of defence. But where persons had been served with a third party notice by the defendant for the purpose of claiming an indemnity, and had obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2) that they should be at liberty to appear at the trial of the action and oppose the plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses:—

Held (reversing the decision of *Kay*, J.), that the third parties had been placed by the order in the position of defendants, and had a right to examine the plaintiff by interrogatories under Order XXXI., r. 1.

ADJOURNED SUMMONS.

In this action the Ecclesiastical Commissioners had been served by the Defendant with notice under Order XVI., r. 48, claiming indemnity against them in case the Plaintiff should establish his claim.

The Commissioners, on the 30th of June, 1884, obtained leave to put in a counter-claim to the Plaintiff's claim in the action, and on the 30th of July they obtained leave to deliver a statement of defence with the counter-claim, and put in a defence and counter-claim accordingly; but the Court of Appeal having decided that the Court had no power to give them leave to file a counter-claim (1), the Commissioners obtained an order to strike out the defence also.

On the 17th of March, 1885, the Commissioners obtained an order that the question of indemnity as between the Commissioners as third parties and the Defendants should be tried after the trial of the action; and that, pursuant to Order XVI.,

(1) 28 Ch. D. 333.

C. A. 1887 EDEN v. WEARDALE IRON AND COAL COMPANY.

r. 53, the Commissioners as such third parties should be at liberty to appear at the trial of the action and oppose the Plaintiff's claim so far as they might be affected thereby, and for that purpose to put in oral and documentary evidence and to cross-examine the Plaintiff's witnesses.

The Plaintiff then applied for leave to deliver interrogatories for the examination of the Commissioners, which was granted by Mr. Justice *Kay*, and the Court of Appeal affirmed his decision (1).

The Commissioners applied in their turn, by this summons, for leave to deliver interrogatories to the Plaintiff.

The summons was heard by Mr. Justice *Kay* on the 28th of February, 1887.

Blakesley, for the Commissioners:—

The question is whether the right which it has been decided by the Court of Appeal the Plaintiff has under Order XXXI., rule 1, to cross-examine the Commissioners as "opposite parties," is reciprocal. I submit that justice requires that it should be so. We are defendants within the meaning of the definition in the *Judicature Act*, 1873, sect. 100; if not by the mere fact of being third parties, at all events by the force of the order of the 17th of March, 1885.

Dunham, for the Plaintiff:—

The Court has no jurisdiction under the rule to allow a third party to an action to interrogate either the plaintiff or the defendant. It is only "the plaintiff or defendant" who may obtain leave to interrogate, and it has been decided by *Eden* v. *Weardale Iron and Coal Company* (2), that the word "defendant" as defined by sect. 100 of the *Judicature Act*, 1873, does not include a third party. That decision governs the present, for the Commissioners are in the same position towards the Plaintiff as they were then. Therefore, although a third party may be interrogated, he has not, according to the rule, a corresponding right to interrogate.

[KAY, J.:—Cannot the third party get leave to interrogate by applying to the Court for directions under Order XVI., rule 53?]

(1) 34 Ch. D. 223. (2) 28 Ch. D. 333, 339.

No; because there being special provisions made for discovery by Order XXXI., you cannot apply under the general provisions of Order XVI., rule 53.

Blakesley, in reply.

KAY, J. (after stating the facts as they already appear in the former reports of the case, continued):—

It was on the ground that the Ecclesiastical Commissioners were, under the order of the 17th of March, 1885, parties "opposing" the Plaintiff's claim, that the Plaintiff applied for leave to cross-examine them on interrogatories, and the Court of Appeal granted the Plaintiff leave to do so, because the Commissioners came within the exact words of Order XXXI., rule 1, by which a plaintiff may "deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties." The Court decided that the Commissioners were distinctly "opposite parties," inasmuch as they had obtained leave to oppose the Plaintiff's claim at the trial. The Ecclesiastical Commissioners thus being "opposite parties" say, "We now come in our turn for leave to deliver interrogatories to the Plaintiff:" but it is said, "No, you cannot do that; it is not 'opposite parties' who may deliver interrogatories; it is only the Plaintiff or Defendant who can do so." That is so according to the order. Clearly the Commissioners are not Plaintiffs, and it is said, "you, the Commissioners, are not Defendants;" and for that reference is made to the decision in this very action—*Eden* v. *Weardale Iron and Coal Company* (1). It seems that the Commissioners having, under the orders of the 30th of June and 30th of July, 1884, put in a defence and counter-claim, the Plaintiff moved to strike out the counter-claim; and in ordering the counter-claim to be struck out judgments were delivered by the learned Judges in which they considered carefully whether or not the Ecclesiastical Commissioners were in a position which entitled them to bring in a counter-claim. Now, by the rules the only person who can put in a counter-claim is a defendant, and the argument was that the Ecclesiastical Commissioners

(1) 28 Ch. D. 333, 339.

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were not defendants; and in support of that reference was made to the 100th section of the *Judicature Act*, 1873, which defines who, within the meaning of the rules, a "defendant" may be. The section says, "'defendant' shall include every person served with any writ of summons"—that does not apply to this case—"or process, or served with notice of, or entitled to attend any proceedings." Now I confess that if it had been left to me to decide whether, after the order of the 17th of March, 1885, which entitles them to attend the trial and oppose the Plaintiff's claim, the Ecclesiastical Commissioners were or were not Defendants for the purpose of interrogating, I should have said they were. But I cannot possibly distinguish this case from that decision, because both the Judges who decided that case say most distinctly in their judgments that, although an order had been made entitling them to put in a defence, they were not "defendants" for the purpose of having leave given them to counter-claim. Referring to the definition in sect. 100 of the word "defendant," Lord Justice *Bowen* says (1): "I am not satisfied that a third party is a person who can be said to be 'served with notice of or entitled to attend any proceedings:'" and Lord Justice *Fry* says (2): "The only question is whether he (the third party) comes under the words 'served with notice of or entitled to attend any proceedings.' These words seem to me to be intended to apply primarily, if not exclusively, to persons attending or served under Order XVI., rule 40, by which in certain actions persons interested may be served with notice of the judgment, and may have liberty to attend the proceedings." Accordingly I feel myself completely bound by that decision, and I must hold that, although the Ecclesiastical Commissioners have got liberty to attend at the trial and oppose the Plaintiff's claim, they are not, so far as the facts go, within the definition of "defendant," and consequently they are in a position in which they are exposed to any amount of interrogation, but in their turn have no power themselves to interrogate. I should like to call the attention of the Rule Committee to this point. I dismiss the summons, but without costs.

G. I. F. C.

(1) 28 Ch. D. 337. (2) 28 Ch. D. 339.

From this decision the Commissioners appealed. The appeal was heard on the 31st of March, 1887.

Blakesley, for the Appellants.

Dunham, for the Plaintiff.

COTTON, L.J.:—

In this case the Ecclesiastical Commissioners, who were not original parties to this action, but were brought in as third parties, the Defendants contending that they had a right of indemnity against them, sought to interrogate the Plaintiff in the action, and Mr. Justice *Kay* thought that he could not give them leave to deliver interrogatories. That depended on Order XXXI., r. 1, and that being the rule which now guides the Court, we must consider whether the Ecclesiastical Commissioners are, within the meaning of the rule, Defendants.

In order to decide that question we must look at what has been done in these proceedings; and we must also look to the interpretation clause of the *Judicature Act*, 1873, which governs the construction of the rule I have referred to. When the matter came on a former occasion before the Court of Appeal, the Plaintiff sought to interrogate the Ecclesiastical Commissioners; and we considered that under an order of the 17th of March, 1885, the Ecclesiastical Commissioners had been put in such a position as that they could be interrogated by the Plaintiff; and it would be extraordinary indeed if the Ecclesiastical Commissioners were by that order put into the position of being liable to being interrogated by the Plaintiff, on the question which was to be tried between them under that order, but yet that the Commissioners could not interrogate the Plaintiff with reference to the same question. In my opinion it cannot be said that a third party, as such, is a defendant within the interpretation clause; but it may be that an order may be made as regards the person who is brought in as a third party, which puts him as between himself and the plaintiff in the position of being defendant in the action, the plaintiff being the person who is claiming as against him.

Now what was the order of the 17th of March, 1885? It was

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an order obtained by the Ecclesiastical Commissioners which materially altered their position in the action from that which it was previously to that order. It was ordered "that notwithstanding the order of the 30th of June, 1884, the question of indemnity as between the Ecclesiastical Commissioners and the Defendants be tried after the trial of this action." That was the question to determine which the Ecclesiastical Commissioners were brought in as third parties—to decide the question of the claim to indemnity as between themselves and the original defendants; "and pursuant to Order XVI., r. 53, the Ecclesiastical Commissioners, as such third parties, are to be at liberty to appear at the trial of this action and to oppose the Plaintiff's claim so far as they may be affected thereby, and for that purpose to put in oral and documentary evidence." So that they were to try the question in respect of which they were brought in as third parties, namely, the question of indemnity after the trial of the action; but the order puts them in this position, that before that question of indemnity arose at all, they were to come in and at the trial of the action to contest with the Plaintiff the right which he claims as against the original Defendants. They were entitled for the purpose of litigating the question raised by the Plaintiff in his action to appear at the trial, and to contest that with him, and to attend the proceedings in the action, where the Plaintiff, as against the Defendants, was seeking to obtain judgment. It is very true that the Plaintiff would not as against the Commissioners be able to get any judgment, but they were entitled to go in and attend the trial of the action, and if they could to defeat the very foundation of his claim. In my opinion, they come within the definition of "defendant" which we find in the 100th section of the *Judicature Act*; because it says "'defendant' shall include every person served with any writ of summons or process, or served with notice of, or entitled to attend any proceeding." They were put in the position of being entitled to attend, as opponents of the Plaintiff, at the trial of the action, that is to say, to take part in the proceedings just as if they were Defendants, but with this qualification—that they could not be made directly answerable to the Plaintiff in the action. And, in my opinion, that carries with it the right to take any such

proceedings previously to the trial of the action which a person made a defendant by the liberty given to attend proceedings, might take, including also the right under rule 1 of Order XXXI., to interrogate the Plaintiff.

But the Plaintiff relies upon an expression of opinion of Lord Justice *Fry* when this case was previously before the Court on the question as to whether the third party, the Ecclesiastical Commissioners, had properly had liberty given to them to file a counter-claim (1). The expressions relied upon in his judgment were, that "these words seem to me to be intended to apply primarily, if not exclusively, to persons attending or served under Order XVI., r. 40, by which in certain actions persons interested may be served with notice of the judgment, and may have liberty to attend the proceedings." I quite agree with Lord Justice *Fry* that that was probably what attention was specially directed to. But he in no way decided that these words did exclusively apply to such parties, and this particular question now before us was not present to his mind. All that was then before him was this—that the Ecclesiastical Commissioners had been served with a third party notice. I quite agree that, as between the Plaintiff and the third parties, that did not put them in the position of being, as regards the Plaintiff in the action, his Defendants. That was not bringing them in in the sense of opposite parties as Defendants. But that is entirely different from the question which we have to decide when the order of the 17th of March had, as we decided on the application of the Plaintiff, put them in the position of opposite parties, parties having an issue to try with the Plaintiff; and, in my opinion, that brought them within the meaning of the word "defendant" in the interpretation clause by entitling them to appear hostilely (as opposite or opposing parties to the Plaintiff) at the trial of the action to try an issue with the Plaintiff.

Then it is said that the previous decision to which I have referred of Lord Justice *Fry* is against the view I have expressed, because the Commissioners were then in the same position as they are now. In my opinion that is not so. The order of the 17th of March, 1885, did not exist when, in 1884, the previous order of the 30th of June, giving the Commissioners liberty to deliver the counter-claim, was under appeal. It is true that there

(1) 28 Ch. D. 339.

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was an order then existing of the 30th of July, 1884, which gave the Commissioners leave to deliver a statement of defence. But, in my opinion, neither that order nor the defence which was put in under it, put them in the same position of being entitled to attend the hearing, and at the hearing to contest with the Plaintiff the issues he raised in that action. That order of the 30th of July was simply this—that they be at liberty to deliver a statement of defence with their counter-claim. I will read the words of it—"It is ordered that the applicants" (that is the Ecclesiastical Commissioners) "be at liberty on or before the 5th of August, 1884, to deliver a statement of defence in this action as to such portions of the Plaintiff's statement of claim, and of the Defendants' statement of defence, as they do not admit together with their counter-claim." That did not in any way in terms give them liberty to attend the proceedings at the trial of the action, but merely gave them liberty to put in such a defence as they pleased as between themselves and the Defendants, the Defendants claiming against them a right of indemnity; for if it was a right to appear against the Plaintiff, and as against the Plaintiff only, all they would have done would have been to put in such a defence to the Plaintiff's claim against the Defendants, as they might be advised. But the right of indemnity depended on two things, on the Plaintiff being entitled to the property, and on the Commissioners having agreed to indemnify the Defendants, and they were at liberty, therefore, of course to say that there was no right of indemnity, because although by the nature of their defence, or by mismanaging their defence, or in any other manner the Defendants may have allowed judgment to go against them, in fact and in truth the property was theirs, and the Defendants ought to have managed their defence so as to shew that that was the case. Then, of course, the other case was—that the Commissioners never had covenanted to indemnify the Defendants. It is very true that when they put in a defence they only addressed themselves to that part of the Plaintiff's claim against them which depended upon the property being, not the Ecclesiastical Commissioners', but that of the Plaintiff. But their putting in that defence did not enable them, because they had no order to do so, to appear at the trial of the action, and to litigate anything at all with the Plaintiff. As between themselves and the

Defendants the litigation would go on after the litigation between the Plaintiff and the Defendants, which was the proper trial of the action, had been concluded. Then there came that order of the 17th of March, 1885, which enabled the third party, who up to that time was simply there to contest the matter with the Defendants, if the Plaintiff had succeeded against the Defendants, to be put in the position of defending the action, attending the proceedings and the trial of the action, in order to litigate with the Plaintiff the question raised in the action. In my opinion, the Ecclesiastical Commissioners come within the proper definition of Order XXXI., rule 1, as being defendants.

I may add this, that although we have got the words here that a plaintiff or defendant may interrogate the opposite party, I agree with what was intimated by Lord Justice *Lindley* in the course of the argument, that as regards the words "opposite party," there is no magic in them. It was merely intended to use those words so as, without great verbiage and length of language, to enable a plaintiff to interrogate a defendant and a defendant to interrogate a plaintiff; but the words of definition of "plaintiff" and "defendant" in the 100th section of the *Judicature Act* are so wide as to include all persons who litigate one against the other in any proceeding any question which the Court may properly decide. In my opinion, therefore, the appeal ought to succeed, and liberty ought to be given to the Ecclesiastical Commissioners to interrogate the Plaintiff.

LINDLEY, L.J.:—

I am of the same opinion. It appears to me that after the decision of this Court which is reported in 34 Ch. D. 223, it is impossible to deny the right of the Ecclesiastical Commissioners to interrogate the Plaintiff. The decision in that case and the decision in this present case, turn entirely on the order which was made on the 17th of March, 1885, the practical effect of which is to entitle the Ecclesiastical Commissioners, although they are third parties, to defend this action as against the Plaintiff. They are fighting the Plaintiff under that order—not fighting their co-Defendants. Having got that order they are in a different position from that which they were in when this Court had to decide the point which was raised, and which is

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reported in 28 Ch. D. 333. That was raised before this order of the 17th of March, 1885. The decision there seems to me to have been right. But everything now turns on what has been done since; and it appears to me, I confess, that Mr. Justice *Kay* has failed to give effect to the order of the 17th of March, 1885, which says that the Ecclesiastical Commissioners, as such third parties, are to be at liberty to appear at the trial of the action and to oppose the Plaintiff's claim so far as they may be affected thereby, and for that purpose to put in oral and documentary evidence, and to cross-examine the Plaintiff's witnesses. What does that mean except this? That practically they are in the position of defendants for the purposes of this litigation, up to the trial, at all events. Now, it was upon that footing because they were defendants within the true meaning of the 100th section of the *Judicature Act*, that it was held by this Court that the Plaintiff had a right to interrogate them. It is very true the former case was a little easier than this; because it was obvious that in the former case the Ecclesiastical Commissioners were opposite parties within the words even of Order XXXI., rule 1, which relates to discovery and inspection. But when you look to see what is meant by "opposite parties," I do not think it means more than the plaintiff or the defendant, the defendant if the plaintiff is applying for inspection, and the plaintiff if the defendant is applying for inspection. I cannot see who is an opposite party within the meaning of the rule if he is not either a plaintiff or a defendant within the interpretation clause—sect. 100 of the *Judicature Act*. I do not think that it is possible to find such a person. Accordingly we find, when we look into the judgment of the Court, which is reported in 34 Ch. D. 223, that the Lords Justices treated the Commissioners as Defendants as well as opposite parties. Being Defendants not because they are third parties, but by reason of the order of the 17th of March, 1885, they are entitled to leave to deliver interrogatories—what kind of interrogatories we have not to consider.

The appeal will be allowed with costs.

Solicitors: *White, Borrett & Co.; Crossman, Crossman & Prichard.*

M. W.

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Feb. 24, 25, 26; *March* 5.

[1875 P. 39a.]

Administration Action—Creditors—Real Estate—Specific Devisee—Lis Pendens—Registration—Priority.

Where debts are charged upon a testator's real estate by his will, or as judgment debts under the old law, an action by a creditor for the administration of the real and personal estate is a *lis pendens* which, when registered, gives the plaintiff priority over a purchaser or mortgagee from any defendant entitled to real estate under the will, except where the defendant is in such a position that the purchaser or mortgagee has a right to suppose he is selling or mortgaging for the purpose of paying the testator's debts.

A creditor's action for general administration may be a sufficient *lis pendens*, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking, subsequently to the registration of the *lis*, from a specific devisee who is a defendant, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action; a mere general claim for administration of the real and personal estate not being of itself a sufficient indication of intention to make liable the specifically devised real estate.

Drew v. *Earl of Norbury* (1) and *Walker* v. *Flamstead* (2) considered.

Adjourned Summons.

On the 30th of December, 1875, the writ in this action was issued by the Plaintiff, *Philip Price*, as the survivor of two trustees of a marriage settlement, against *James Gilbert Price* and *Nicholas Gilbert Price*, as executors of their father, the deceased trustee, claiming payment from them of the trust fund, £1000, which had been received and improperly retained by their testator.

The testator had died in June, 1873, having made a will appointing his sons, the Defendants, his executors, and specifically devising parts of his real estate to them respectively, and other portions to persons not parties to the action.

The original statement of claim, which was delivered on the 2nd of March, 1876, stated that the Defendants' father received the £1000, and claimed payment from the Defendants as his executors, but did not ask for administration.

(1) 3 J. & Lat. 267. (2) 2 Keny. part 2, p. 57.

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On the 11th of May, 1878, the Plaintiff registered the action as a *lis pendens* against both Defendants.

On the 28th of July, 1879, the writ was amended by adding that the Plaintiff claimed as a beneficiary as well as trustee, and by stating that the Defendant *James Gilbert Price* was also sued as a person who had actually received the trust funds.

On the 26th of March, 1879, an amended statement of claim was delivered, which stated in paragraph 9 the death of the late trustee, having appointed the Defendants his executors, and asked that, as such executors, the Defendants might be ordered to pay to the Plaintiff the £1000 and interest, and if they should not admit assets, then for administration of the real and personal estate of the deceased trustee. That was the only mention in the statement of claim of the real estate of the deceased trustee. There was no averment that he had devised any real estate, or that he had any real estate to devise. The greater part of the statement of claim consisted of allegations tending to shew that the Defendant *James Gilbert Price* had become personally liable for the £1000.

By the judgment in the action, dated the 20th of March, 1880, it was declared that the Defendant *J. G. Price* was personally liable and that the estate of the deceased trustee was also liable to pay the £1000 and interest; and the Defendants not admitting assets, the usual creditor's judgment was pronounced providing that, in case the personal estate should be insufficient for payment of debts, there should be an inquiry what real estate the deceased trustee had at the time of his death, and whether since his death any part of it had been sold or mortgaged by the Defendants, and, if so, an account of the moneys received by them.

Previous to that judgment, but after the registration of the *lis pendens*, the Defendant *Nicholas Gilbert Price* gave two equitable charges, one for £2000, dated the 18th of November, 1878, before the amendment of the statement of claim, and one for £1500, dated the 19th day of July, 1879, after such amendment, upon certain real estate specifically devised to him by the deceased trustee; and on the 18th of May, 1880, he, in pursuance of these equitable charges, gave a legal mortgage for £3300, the amount then remaining due on the equitable charges. On the 10th of

May, 1881, this mortgage was transferred to *Manley Ashwin*, who was trustee in bankruptcy of the Defendant *J. G. Price*.

On the 22nd of June, 1881, an order was made, on the application of the Plaintiff, adding to the inquiries directed by the judgment an inquiry what parts of the real estate of the deceased trustee were specifically devised by his will and to whom, and who was then entitled thereto. In answer to the inquiries directed under the judgment the Chief Clerk certified that the Defendant *Nicholas Gilbert Price* had mortgaged in manner above stated the real estate specifically devised to him, that the legal mortgage had become vested in *Ashwin*, and that the mortgage debt of £3300, with arrears of interest, still remained due to him.

This summons was taken out by the Plaintiff, *Philip Price*, and other creditors of the testator who had been joined as Plaintiffs during the progress of the action, claiming that the Plaintiff and the other creditors of the testator *J. G. Price* were entitled in priority to *Manley Ashwin* to the real estate devised to *Nicholas Gilbert Price* and comprised in the mortgage then vested in *Ashwin*.

Horton Smith, Q.C., and *Blackmore*, for the Plaintiffs:—

We submit that, the mortgages being subsequent to our registration of the *lis pendens*, we are entitled to priority.

[They were stopped by the Court.]

Ince, Q.C., and *A. B. Walford*, for *Ashwin*:—

We submit that this is not such a *lis pendens* as is binding upon us. The statutes 3 & 4 Will. 4, c. 104, and 1 & 2 Vict. c. 110, create only a general not a specific charge of debts on the lands of a deceased person, and therefore, the charge being general only, a mere creditor's action for administration does not prevent a devisee from dealing with the estate devised to him, or oblige a purchaser to take notice of the action: *Walker* v. *Flamstead* (1); *Kinderley* v. *Jervis* (2); *British Mutual Investment Company* v. *Smart* (3); *Jones* v. *Noyes* (4); *Holt* v. *Dewell* (5); *Houlditch* v. *Wallace* (6); *Drew* v. *Earl of Norbury* (7); *Bellamy* v. *Sabine* (8).

(1) 2 Keny. part 2, p. 57.
(2) 22 Beav. 1.
(3) Law Rep. 10 Ch. 567, 578.
(4) 4 Jur. (N.S.) 1033.
(5) 4 Hare, 446.
(6) 2 Cl. & F. 629.
(7) 3 J. & Lat. 267.
(8) 1 De G. & J. 566.

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Again, in the case of executors, an action by a creditor for administration does not of itself suspend the executor's right to dispose of the property and make a good title: the purchaser not being bound to see to the application of the purchase-money is entitled to assume that it has been applied in payment of debts: *Berry* v. *Gibbons* (1); *Neeves* v. *Burrage* (2). To make a *lis pendens* notice to a purchaser of an estate, the question in the action must relate specifically to the estate and not merely to the money secured upon it: *Sugden's* Vendors and Purchasers (3); *White & Tudor's* Leading Cases (4). A *lis pendens* always implies a claim to charge specific property: *Ex parte Thornton* (5). An executor may even prefer a creditor in an administration action provided he does so before judgment: *In re Radcliffe* (6). *Drew* v. *Earl of Norbury* (7) is the only authority in which it was suggested that a general administration action was a *lis pendens* binding on a purchaser of specific land: and on rehearing the case Lord *St. Leonards* declined to decide the question.

Horton Smith, in reply:—

A *lis pendens* is constructive notice to a purchaser: *Worsley* v. *Earl of Scarborough* (8), cited in *Bellamy* v. *Sabine* (9); *Com.* Dig. "Chancery" (10) citing *Culpepper* v. *Aston* (11); *Story's* Equity Jurisprudence (12). The Act 2 & 3 Vict. c. 11, s. 7, only makes this difference in the old law—that whereas formerly the mere pendency of an action was sufficient, now, in order to bind a purchaser, he must have express notice of the action, or, if there is no express notice, there must be registration of the *lis pendens*. A *lis pendens* is in fact notice of a claim, putting a purchaser on inquiry into the validity of that claim, and any person buying an estate affected by the action is bound to take notice of the action.

The authorities support the view that a general administration

(1) Law Rep. 8 Ch. 747.
(2) 14 Q. B. 504.
(3) 14th Ed. p. 758.
(4) 5th Ed. vol. ii. pp. 75, 76.
(5) Law Rep. 2 Ch. 171, 178.
(6) 7 Ch. D. 733.
(7) 3 J. & Lat. 267.
(8) 3 Atk. 392.
(9) 1 De G. & J. 566.
(10) 2nd Ed. vol. ii. p. 747.
(11) 2 Ch. Cas. 115.
(12) 13th Ed. vol. i. pp. 411–414.

action is sufficient to affect a purchaser with notice: *Drew* v. *Earl of Norbury* (1); *Jennings* v. *Bond* (2), where Lord *St. Leonards* considered *Walker* v. *Flamstead* (3), pointing out that all decided by that case was that a creditor's suit did not stop the execution of the trusts of the will. No authorities were cited in *Walker* v. *Flamstead*, and it is contrary to the well-established rule of the Court prohibiting alienation during the pendency of a suit: *Walker* v. *Smalwood* (4); *Metcalfe* v. *Pulvertoft* (5); *Bellamy* v. *Sabine* (6); *Sorrell* v. *Carpenter* (7); *Garth* v. *Ward* (8); *Bishop of Winchester* v. *Paine* (9); *Higgins* v. *Shaw* (10).

KAY, J.:—I will consider the authorities.

1887. March 5. KAY, J. (after stating the facts, continued):—

The ground of the claim made by the summons is that this action was a registered *lis pendens* at the date of the mortgages by *Nicholas Gilbert Price*. The first question is whether an action by an unsecured creditor to administer real and personal estate is a *lis pendens*. Clearly it would not be in the case of a specific devisee who was not a party to the action. But supposing one of the defendants was a specific devisee, and the writ and statement of claim suggested that it would be necessary to resort to the specifically-devised real estate, would that be a sufficient *lis pendens* as against that particular devisee?

The ground of the doctrine is thus stated by Lord *Hardwicke*:—"It is the pendency of the suit that creates the notice; for as it is a transaction in a sovereign Court of Justice, it is supposed all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation, and then in contest; but where it is only a decree to account, and not such a one as puts a conclusion to the matters in question, that is still such a suit as does affect people with notice of what is doing": *Worsley* v. *Earl of Scarborough* (11). In *Bellamy*

(1) 3 J. & Lat. 267, 270.
(2) 2 J. & Lat. 720.
(3) 2 Keny. part 2, p. 57.
(4) Amb. 676.
(5) 2 V. & B. 200.
(6) 1 De G. & J. 566.
(7) 2 P. Wms. 482.
(8) 2 Atk. 174.
(9) 11 Ves. 194.
(10) 2 D. & War. 356.
(11) 3 Atk. 392.

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v. *Sabine* (1) this language was somewhat criticised by Lord *Cranworth*. The contention there was that a *lis pendens* gave notice to a purchaser from a defendant of the rights of a co-defendant disclosed by the litigation. Lord *Cranworth*, refusing to carry the doctrine to this length, said that it was not perfectly correct to say that a *lis pendens* is implied notice to all the world. What ought to be said is that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The Lords Justices *Knight Bruce* and *Turner* agreed with that view, the latter saying that the foundation on which the doctrine rests is the impossibility of bringing an action or suit to a successful termination if alienation *pendente lite* were permitted to prevail.

Lord *Hardwicke*, in 1754, held that a suit by a creditor, whose debt was charged by the will on the real estate, against the devisee, who afterwards, before decree, mortgaged the property, must be postponed to the mortgagee; and he stated the law thus:—"Upon the whole, the rule is, that a general bill brought for an account of a personal estate, or of real and personal, both consisting of various parts, by no means creates such a *lis pendens* as will affect a purchaser from the devisee; but in the case of a bill, charging a particular estate with a particular trust, it is otherwise": *Walker* v. *Flamstead* (2). It appears from the record, which I have examined, that the bill in that case was filed by bond creditors, on behalf of themselves and the other bond creditors, against the executrix and devisee and the heir of the obligor for satisfaction out of his personal and real assets devised by him for payment of his debts. The devisee in fee of the testator's real estate charged by his will with the payment of his debts, being also his executrix, mortgaged part of such real estate, *pendente lite*, to one *Baker*, who was brought before the Court by supplemental bill. The Court ordered an account to be taken of what was due to *Baker* on the mortgage, and payment of the amount out of the proceeds of the estate mortgaged to him, which was directed to be sold. It appears from his answer that the mortgagee alleged that he believed the money was borrowed for the purpose of paying the debts of the testator.

(1) 1 De G. & J. 566. (2) 2 Keny. part 2, p. 60.

Lord *Camden*, in 1768, held that a suit by creditors for sale of an estate charged by the will with payment of debts, at least where the parties had put in their answers and submitted to the jurisdiction, was binding upon a purchaser from the trustee after the filing of the bill: *Walker* v. *Smalwood* (1).

In *Higgins* v. *Shaw* (2), persons claiming under a settlement, made by a devisee after decree for account of real and personal estate of the testator in a suit against him by a bond creditor were held to be bound by the *lis pendens*.

In *Jennings* v. *Bond* (3), judgment creditors of a deceased person, in 1835, filed a bill against his heir, executor, and devisee, alleging a *devastavit* by the executor, and that only the real estate remained for payment of the judgment debt, and asking for the usual accounts of the real and personal estate and a receiver of the real estate. It was held that this was a sufficient *lis pendens* as against a purchaser of the estate. The Lord Chancellor said (4), "The doctrine was laid down at large by two Chancellors in *Culpepper* v. *Aston* (5), and I am not aware of any case in which it has been laid down that such a suit as that of 1835 was not a sufficient *lis pendens* to bind a purchaser. *Walker* v. *Flamstead* (6) only decided that a creditor's suit does not stop the execution of the trusts of the will."

In *Drew* v. *Earl of Norbury* (7), a testator devised land in *Ireland* to trustees upon trust to sell and pay debts, including a judgment debt to one *Purdon*, and the residue of his real and personal estate to his daughters for life, with remainders over. *Purdon's* representatives filed a bill against the devisees, praying for sale of those real estates, and pending that suit the defendants made a second lease of the property for lives. Lord *St. Leonards* said (8) that it had been argued "that this was not such a suit as by its pendency would bind a purchaser of the estate, it having been instituted by a creditor having a general charge upon the land, and not by a specific incumbrancer. It was a suit, however, which could only be carried out by a sale of

(1) Amb. 676.
(2) 2 D. & War. 356.
(3) 2 J. & Lat. 720.
(4) Ibid. 744.
(5) 2 Ch. Cas. 115, 221.
(6) 2 Keny. part 2, p. 57.
(7) 3 J. & Lat. 267.
(8) Ibid. 282.

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the estate itself, for payment of incumbrances prior to the right of the person by whom the second lease was granted; and, therefore, I think there was a sufficient *lis pendens* to affect a purchaser from him with notice of the suit." On the next day he directed the case to be re-argued before himself, assisted by two other Judges. There were other matters which rendered it unnecessary ultimately to decide the question of the *lis pendens*, and the Lord Chancellor is stated to have said this (1):—"I say nothing as to the existence of the *lis pendens;* for, though there is a serious question on that point, it is not necessary to decide it." In the 14th edition of his work on Vendors and Purchasers (2), he refers to *Drew* v. *Earl of Norbury* (3), but only as an authority for the proposition that a plaintiff who desires to rely on a *lis pendens* must not be guilty of laches in prosecuting the suit. Evidently, therefore, he did not himself consider the question, whether such a suit was, in truth, a *lis pendens* against a purchaser from the devisee, free from doubt. It will be observed that in that case the land was subjected by the will to a previous trust to pay the plaintiffs' debt and other debts.

My conclusion from these authorities is, that where debts are charged upon a testator's real estate by his will, or as judgment debts under the old law, a suit by a creditor to administer the real and personal estate is a *lis pendens*, which, when registered, gives the plaintiff priority over a purchaser or mortgagee from any defendant entitled to real estate under the will. But there is an exception where the defendant is in such a position that the purchaser or mortgagee has a right to suppose he is selling or mortgaging for the purpose of paying the testator's debts. This was the case, as Lord *St. Leonards* points out in *Walker* v. *Flamstead* (4); and for a similar reason it was held, in *Neeves* v. *Burrage* (5), that the pendency of a creditor's suit did not prevent the executor, who was a defendant, from selling leasehold property of the testator. The same doctrine was applied in *Berry* v. *Gibbons* (6), where an executrix had mortgaged a valuable picture pending a suit for administration by one of the next of kin, in

(1) 3 J. & Lat. 305.
(2) Page 758.
(3) 3 J. & Lat. 267.
(4) 2 Keny. part 2, p. 57.
(5) 14 Q. B. 504.
(6) Law Rep. 8 Ch. 747.

which an administration decree had been made, and which was registered as a *lis pendens*.

One difference in the present case is, that the Plaintiff in the administration suit had no charge upon the devised estate of the testator, except such as might be given him by the statute 3 & 4 Will. 4, c. 104, making real estates assets for the payment of debts. The effect of that statute was stated by Lord *Romilly*, who was the author of it, in *Kinderley* v. *Jervis* (1), in which, adopting the language of Lord *St. Leonards* in *Hamer's Devisees' Case* (2), Lord *Romilly* said (3), "It was not the object, nor is it the operation, of the statute 3 & 4 Will. 4, c. 104, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate, but as the statute makes the land *assets* for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bonâ fide* purchaser of the lands, from the heir or devisee, is bound to see to the application of the purchase-money, as he would be in the case of a particular mortgage on any portion of the lands themselves." And he held that such general charge had priority over judgments entered up against the heir or devisee. In *British Mutual Investment Company* v. *Smart* (4) it was held, however, that an equitable charge made by the devisee before a creditor's bill was filed had priority over this general charge. Perhaps it would be more accurate to say that the statute makes debts rather an inchoate than an actual charge, and that the creditor has no actual charge until decree.

But where the real estate sought to be charged by the creditor's suit is sufficiently indicated, and the specific devisee is a defendant, my opinion is that, subject to the exception I have mentioned, a registered creditor's suit would be a sufficient *lis pendens*, before final decree, to entitle the plaintiff to priority over a purchaser or mortgagee from the defendant after such registration.

The exception of a devisee who might be supposed to be mortgaging for the purpose of paying the testator's debts does not apply in this case. But upon a close examination of the facts,

(1) 22 Beav. 1.
(2) 2 D. M. & G. 366, 372.
(3) 22 Beav. 22.
(4) Law Rep. 10 Ch. 567.

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it does not appear to me that, before these mortgages, the purpose of making liable the real estate specifically devised to *Nicholas* was indicated sufficiently, if at all. Supposing the mortgagee to have had all the pleadings before him and to have examined them carefully, he would have found a writ which only mentioned the Defendants as executors of the deceased trustee; an original statement of claim, which did not seek any administration; and then an amendment, after the first equitable mortgage and before the second, which did not state that the testator had devised any real estate to *Nicholas* or had any real estate, and only mentioned real estate in the general claim to have his real and personal estate administered. It was not until the 22nd of June, 1881, that an intention to make the specifically devised real estate liable was shewn by the inquiry added at that date. This was a year after the legal mortgage of the 18th of May, 1880. The added inquiry was necessary to obtain an order against the real estate devised to the Defendant *Nicholas*, because it was only bound to contribute rateably with other property specifically devised. In my opinion, it was not until that inquiry was ordered that there was any sufficient indication of an intention to attack the specifically devised property to constitute a *lis pendens* against it, and, consequently, the mortgagee has priority to the claim of the Plaintiffs in this action. The summons must be dismissed, with costs.

Solicitors: *Cooke & Jonas*, agents for *Payne & Fuller, Bath; J. T. & G. F. Marshall*, agents for *Gabb & Walford, Abergavenny.*

G. I. F. C.

CLARKE *v.* THORNTON.

CHITTY, J.

[1864 C. 53.]

1887

Jan. 18, 19.

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38)—*Repairs and Improvements—Income or Capital.*

Lands were devised in 1861 to trustees during the lives of certain tenants for life, in trust to receive the rents and manage the estate with the powers of absolute owners. An annuity was directed to be paid to the tenant for life in possession out of the rents, and the surplus rents were to be laid out in the purchase of real estates or accumulated for a period of twenty-one years from testator's death, and the income of the accumulations paid to the tenant for life. From the expiration of that period the whole of the surplus rents yearly accruing to be paid to the tenant for life in possession, and also the income of the accumulated surplus.

The period of twenty-one years from testator's death expired in January, 1885. The trustees named in the will disclaimed, and the property had since been managed by a receiver appointed by the Court. The surplus rents accumulated during the twenty-one years amounted to £37,000.

Repairs and improvements amounting to between £4000 and £5000 were required to be made on the settled property:—

Held, that such of the proposed works as were in the nature of improvements within the description contained in sect. 25 of the *Settled Land Act*, 1882, should be provided for out of the £37,000, which was capital money within the Act; and that those which were merely repairs must be paid for out of the income of the property.

ADJOURNED SUMMONS, raising the question whether repairs and improvements on the settled property were payable out of capital moneys, the result of accumulations directed by the testator, or out of income only.

By his will, dated the 13th of June, 1861, *Thomas Butler Cole* devised his mansion, *Kirkland Hall*, with certain land adjoining, and also his mansion *The Cote*, with lands adjoining, unto and to the use of *Thomas Butler* for life, with remainder to *C. E. Thornton* for life; remainder to *Henry Rose Clarke* for life; remainder to *Henry Clarke* for life; and after the death of the survivor of the four tenants for life, to trustees upon trust to hold the same upon the trusts thereinafter declared concerning testator's residuary real estate. The residue of testator's real estate was devised unto and to the use of the trustees, during the lives of the four tenants for life and the life of the survivors and survivor of them, upon trust to enter into possession or receipt of the rents and

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manage the estate, with powers to cut timber and underwood from time to time in the usual course, for sale, or repairs or otherwise, and erect, pull down, and repair houses and other buildings and erections, and drain or otherwise improve all or any of the devised hereditaments, and insure houses, buildings, and other property, and generally to deal with the premises as if they were absolute beneficial owners; and out of the rents and profits of the premises (including the produce of the sale of timber and underwood) pay and discharge the expenses incurred in or about such management, or in the exercise of any of the powers aforesaid, or otherwise in respect of the premises, and all outgoings not payable by any tenant, and also to keep down interest on charges. Out of the surplus rents an annuity of £1800 was to be paid to the tenant for life, for the time being in possession of the mansions, for his life. If any of the four tenants for life should live for more than twenty-one years after testator's death (which period expired on the 25th of January, 1885) then, after the expiration of such period of twenty-one years, the whole of the surplus rents to accrue during every year was to be paid to such one of the tenants for life as for the time being should be in possession of the mansions. The testator further directed that the surplus rents to accrue during the period of twenty-one years should be held upon the trusts declared concerning the proceeds of sale of real estate, viz., upon trust to invest such money in the purchase of real, leasehold, or copyhold hereditaments to be held on the same trusts as the residuary real estates, and until such purchase to invest the same in Government or other stock, the income being directed to be paid or applied to such person or persons for such purposes and in such manner as the rents and profits of the hereditaments to be purchased therewith as aforesaid, would be payable or applicable in case such purchase or purchases were actually made. The will also contained a devise of the residuary real estates in remainder after the death of the survivor of the four tenants for life.

The testator died on the 25th of January, 1864.

Thomas Butler died in March, 1864, and *C. E. Thornton* was the present tenant for life, and as such entitled to the surplus rents from the expiration of twenty-one years from the testator's death.

The trustees of the will disclaimed, and in March, 1864, this bill was filed by *Henry Rose Clarke* the first tenant for life in remainder, against the tenant for life in possession and the tenant in tail, for the administration of the trusts of the will, and on the 21st of April, 1864, a receiver was appointed who had since managed the estate and received the rents.

The surplus rents had been accumulated during the period of twenty-one years expiring in January, 1885, and were now represented by a sum of £37,000.

The present income of the property was stated to be about £7000.

It had become necessary in order to let the farms and obtain an adequate rent, and in the interest of all parties interested in the estate, that a large outlay (£4398 17*s.* 2*d.*) should be made in the erection of new houses and farm buildings and the conversion and reconstruction of existing buildings, in draining, fencing, and planting, walling and railing portions of the property, in repairing the banks of the River *Wyre*, and in the purchase of bone manure for the several farms.

Summonses had been taken out on behalf of the Plaintiff, asking for the confirmation of certain agreements for leases, and for leave for the receiver to expend sums out of the rents in his hands to the amount of £4398 17*s.* 2*d.* in the above-mentioned repairs and improvements.

A cross summons had been taken out by *C. E. Thornton*, the tenant for life in possession, asking that such of the sums mentioned in the Plaintiff's summonses as the Judge might think proper to be expended for purposes other than ordinary repairs, might be raised and paid out of the sum of £37,000 in Court representing the accumulations of surplus rents directed by the testator's will.

Methold, for the Plaintiff.

Maclean, Q.C., and *Popham*, for *C. E. Thornton*, the tenant for life in possession:—

We do not say that the proposed expenditure is not necessary and proper, but we object to having the income so seriously diminished when there is a sum of £37,000, capital moneys within

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the Act, resulting from the accumulations, which can be applied in discharge of the bulk of this expenditure. Though there are no trustees of the settlement sect. 33 of the *Settled Land Act* applies, and the £37,000 is capital money arising under the Act, which at the option of the tenant for life can be applied in payment under sect. 21, sub-sect. iii., for any improvement authorized by the Act and defined in sect. 25. Sect. 26 authorizes the tenant for life when "desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorized by this Act" to "submit for approval to the trustees of the settlement, or to the Court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon." The express provision in the will for payment of repairs and improvements out of income does not affect the right of tenant for life under the Act to have the capital moneys applied in payment for the improvements.

Romer, Q.C., and *Ingle Joyce*, for the infant tenant in tail in remainder:—

The clear intention of the Act was that capital moneys should only be applied in payment for improvements in cases where there was no other fund provided by the settlement, or where the trustees had no express power to execute improvements. Here the testator has in express terms provided that repairs and improvements shall be paid for out of the rents and profits, *i.e.*, out of income; and to grant the application of the tenant for life, would be to set aside and render nugatory all the provisions contained in this will. It cannot be said to be a conflict, within the meaning of sect. 56, sub-sect. 2, between the provisions of the settlement and the provisions of the Act relative to any matter in respect whereof the tenant for life proposes to exercise any power under the Act. Some of the proposed expenditure clearly refers to repairs which are not improvements within the description given in sect. 25.

CHITTY, J.:—

The question is whether certain proposed improvements within the *Settled Land Act* ought to be executed at the expense of

capital moneys, or out of income applicable thereto by virtue, it is said, of a trust or power contained in the will. The will contains trusts, which may be shortly termed management trusts, of a usual but extensive nature, and the trust includes, not only repairs, but improvements. Of course under the *Settled Land Act*, what I may term for shortness ordinary repairs cannot be done at the expense of capital moneys; but the specified works in the nature of improvements which are mentioned in the 25th section, can be done at the expense of capital moneys, and it is hardly necessary to state that the works which are there specified are works of a nature which would not have been considered permanent improvements according to the stricter doctrine of the old Court of Chancery. In other words, there are many works specified in the 25th section which approach more nearly to the nature of repairs, that is, works which are not of a permanent nature or, if I may use such an expression, so permanent a nature as the improvements under the old doctrine of the Court of Chancery. Perhaps to put it better, I should say the 25th section includes works of a character which would not have been considered improvements by the old Court and is more favourable to the land in settlement. One of the objects of the Act, as I pointed out on a former occasion, is the improvement of land; and in order to effectuate the improvement of land, it has been thought right by the Legislature, and I say this reading the Act as a whole, to give extensive powers to a tenant for life, who, if he can apply capital money, for the purposes of these improvements, would be more disposed to do them than if he had to apply only his own income.

The trust in the will is a management trust, and I have no doubt that those who are the beneficiaries in succession, subject to that trust, are tenants for life within the Act, that is tenants for life under sect. 58, sub-sect. 1, cl. ix., which speaks of "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life whether subject to expenses of management or not," and I consider the Legislature in that section was pointing to a trust of the character I have before me, and I see no reason for putting a restricted interpretation on the words "expenses of management." If I

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did the result would be that in numerous cases of wills or settlements containing trusts of this kind, there would be no tenant for life and no person to exercise the power of a tenant for life under the Act. There is no ground for not reading the words, "expenses of management," in the liberal sense which I think is the proper sense to read them in.

The trust is of a mixed character. I think it is not pure absolute discretion, but I think the trustees have a very wide discretion in the execution of the trusts. I do not think they could have said under this trust, they would do nothing at all, would not repair anything, would let the property fall into a state of ruinous decay, and in fact hold their hands altogether. I think there was an obligation on them. But then, as to the works to be done, I think they had a very wide discretion; so that it comes to this, that if they had declined to execute particular works which some person thought proper, but which they in the fair exercise of their discretion thought improper, I do not think the Court would have compelled them to do the works. There are no trustees; it is not proposed that trustees should be appointed; and I do not think it is necessary trustees should be appointed for the purposes of my decision. The trust being a trust which enables repairs to be done, and there being no trustees, it devolves on the Court to execute this trust in a reasonable manner; and therefore, all proper repairs which are mentioned or referred to in the summons, must be done at the expense of income under this trust, because repairs are not within the Act. But there are also improvements required on the estate which would fall within the trust as well as within the *Settled Land Act*. The tenant for life in possession requires that the improvements should be executed at the expense of the capital moneys, and there is a large sum, being capital moneys within the Act, amounting to somewhere about £37,000, which represents money accumulated by means of the surplus income during the continuance of a trust for twenty-one years for accumulations which has now come to an end. That money is plainly capital money within the Act.

The tenant for life says that the 33rd section of the *Settled Land Act* applies. That section [which his Lordship read] gives

an option to the tenant for life to say that money shall be invested or applied as capital money; it is, in my opinion, an option to direct how it shall be invested or applied; the investment or application being within the various other provisions of the Act of Parliament. If the money had been in the hands of trustees it appears to me the tenant for life might have said it is my option that these capital moneys shall be applied in improvements under the Act. If he had done that it would have been his duty to submit under the 26th section a scheme to the trustees. That I am right in this—that the tenant for life has an option—is shewn not only by the words of sect. 33 itself, but by the other sections of the Act, and particularly by sect. 26, which runs thus: "Where the tenant for life is desirous that capital money arising under this Act shall be applied . . . he may submit . . . a scheme for the execution of the improvement" authorized by the Act; and sect. 22, sub-sect. 2, provides, that the investment or other application by the trustees shall be made according to the direction of the tenant for life; and that section was relied upon by me and also by the Court of Appeal in *In re Duke of Marlborough's Settlement* (1) for the purpose of shewing what the intention of the Legislature was. If the tenant for life was desirous of exercising his option in the manner I have mentioned he would have had to submit a scheme to the trustees, and the trustees, in my opinion, notwithstanding this discretionary trust, might without breach of duty have acceded to his application and approved of his scheme. But they might have thought, for some reason or other, that it was more safe for them to have the sanction of the Court; and consequently they might have declined to approve of the scheme, unless there was an order of the Court directing or authorizing them under the 3rd sub-section of the 2nd sub-section of section 26 to apply the capital money in that manner. I think, putting these parts of the Act together, it was intended by the Legislature to give the tenant for life, with a view to the improvement of the land, a power to require the capital moneys to be laid out under a proper scheme for the improvement of the land. It appears to me that the Court would, if the trustees had declined, the money being in

(1) 30 Ch. D. 127; 32 Ch. D. 1.

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their hands, to approve of the scheme and the matter had been referred to the Court, have considered whether the works were works within the 26th section, that is to say, were works for the benefit of the settled land, to put it shortly, and works of the nature or character set forth at large in the 25th section; and I think, having found that the scheme was a proper one having regard to the terms of the 25th section, the Court would have directed or authorized the trustees to comply with the tenant for life's scheme notwithstanding that there was in the will a trust under which, if they were minded so to do, they could have applied income to that purpose. The 21st section, and the other sections of Part VI. of the Act, deal with the question of the "investment or other application of capital trust money," and the 21st section runs thus: "Capital money arising under this Act . . . shall, when received" (subject to certain exceptions which are not material to be mentioned now) "be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes;" and one of the modes is, by sub-sect. iii., "in payment for any improvement authorized by this Act." I read that in connection with the words of the 22nd section, to which I have already referred, and in connection, for the present purposes, with the 33rd section. It appears to me, therefore, without going for the moment to that which is a somewhat difficult section, the 56th, that the true construction of the Act is that the tenant for life has, with a view to the benefit of the settled land, this power.

But what I have said does not quite dispose of the question, because I have been now speaking of the case on the assumption that the money is in the hands of trustees, and the money in this case, as I have stated, is in Court. But I think it would be a strange thing that the Legislature should be held, upon the construction of this Act of Parliament, to have meant that the rights of the tenant for life should depend upon the accident whether the money is or is not in Court. The money being in Court the case falls within the 3rd sub-section of the 26th section, and it appears to me that what I ought to do is to have regard to this power which I think the Legislature intended to confer on the tenant for life, and to do just the same as I should have thought

it right to do if the money had been in the hands of the trustees, and the trustees had referred the matter in substance to the Court.

It is necessary to say one word about the 56th section. According to that section nothing in the Act affects any power exercisable by the trustees under a settlement, and the power given by the Act is cumulative. Consequently, this discretionary trust or power, being of the nature I have already described, is not abrogated by the Act, but is still exercisable by the trustees. The 2nd sub-section of the 56th section, the construction of which has, no doubt, given rise to some difficulties, shortly stated is this: "In case of conflict between the provisions of the settlement and the provisions of this Act relative to any matter in respect whereof the tenant for life intends to exercise any power under this Act, the provisions of this Act shall prevail." I stay for one moment to say that there is no conflict between the provisions of the Act and the provisions of the settlement so far as regards the trust for repairs. There being no provision in the Act with regard to repairs the settlement stands in every respect unaffected so far as relates to repairs. But there is a conflict in my opinion between the provisions of the settlement and the provisions of the Act with regard to the execution of improvements, because I think the tenant for life has one power under the Act, and the trustees another power under the settlement. Then the powers of the Act are to prevail. Consequently, the tenant for life's power is paramount, and then the section goes on to enact that "accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement . . . of any power conferred by the settlement exercisable for any purpose provided for in this Act." That does apply to the trust for improvement, and consequently, in my opinion, if it be necessary to decide the point (I am not sure it is) the tenant for life's consent is required for the exercise of this trust for improvements to be found in the settlement, and which is in conflict with the power conferred upon the tenant for life by the provisions of the Act. I think in this case that it would be a

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proper thing for the trustees to say, if they thought fit, assuming I am in error in my construction of the Act, that having regard to the nature of these improvements, and the large sum which was required for them, the sum being upwards of £4000 as against an income of about £7000 a year, we will decline to exercise our trust for improvements to such a large extent as this, as against the tenant for life; and if they did that I think the Court would not compel them, as I have said, to exercise the power. There are no trustees, but I have the tenant in tail here, and the tenant in tail does not require that there should be trustees for the purposes of this question before the Court. If there had been trustees I am satisfied they would have asked the Court to assist them and direct them what they should do, and if they would not have exercised the discretion themselves I should then have exercised so much of the power or trust which is not discretionary by saying that I think the trustees ought not to incur so large an expenditure as this for the general benefit of the estate at the expense of the tenant for life.

The result is, that in any view of the case I think so much of the works in question as are improvements within sect. 26 ought to be done at the expense of the capital. I am not asked to go into details. That can be worked out in Chambers, and it will go back to Chambers with a direction to the effect I have mentioned, that is to say, repairs must come out of income and improvements under the Act out of capital.

Solicitors: *Gregory, Rowcliffes, & Co.*, agents for *G. Webster & Nephew, Liverpool; Wilkinson & Son*, agents for *Maxsted & Gibson, Lancaster.*

F. G. A. W.

BEDDINGTON *v.* ATLEE.

CHITTY, J.

1887

Feb. 8, 9.

[1885 B. 5476.]

Easement—Implied Grant—Vendor—Equitable Owner—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 2, 4.

The owner (subject to a mortgage in fee) of a house and a plot of land adjoining first leased the house, then contracted to sell the land to the Defendant, and afterwards contracted to sell the house subject to the lease to a person under whom the Plaintiff claimed. The next step was a conveyance of the house by the owner and his mortgagee to the Plaintiff subject to the lease, which was followed by a conveyance (also by the owner and his mortgagee) of the land to the Defendant. The Plaintiff subsequently recovered possession of the house from the lessee for breach of condition:—

Held, that no grant of light to the house could be implied over land which the owner had contracted to sell before the sale or conveyance of the house, and that sect. 6, sub-sect. 2 of the *Conveyancing Act*, 1881, did not apply.

AT and previously to the dates of the indentures of lease and conveyance hereinafter mentioned *James Whitaker* was the owner in fee simple in possession of a piece of land situate at *Shepherd's Bush*, in the county of *Middlesex*, on the north-east side of the *Uxbridge Road*, with the two messuages thereon erected, which had been built in the early part of 1881, and then known as Nos. 12 and 13, *Poplar Terrace*, but afterwards known as Nos. 200 and 202, *Uxbridge Road*, and of the passage at the rear thereof, and of another piece of land which abutted on the north-east or rear of the said passage, but subject as to all the said premises to a legal mortgage in fee simple, which was then vested in *John Burton*, *John William Burton*, and *Henry Burton*.

On the 25th of August, 1881, *James Whitaker* demised the messuage and premises then known as No. 12, *Poplar Terrace*, but afterwards known as No. 200, *Uxbridge Road*, to one *Hartshorn* for a term of twenty-one years from the 29th of September, 1881, and on the 15th of September, 1881, he demised the messuage and premises then known as No. 13, *Poplar Terrace*, but afterwards known as No. 202, *Uxbridge Road*, to the Plaintiff *Bellinger* for a like term of twenty-one years.

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On the 19th of January, 1882, *James Whitaker* agreed to sell to one *David Lionel Beddington* the two messuages and premises Nos. 200 and 202, *Uxbridge Road*, and also the two adjoining messuages and premises, Nos. 196 and 198, *Uxbridge Road*, and in pursuance of an arrangement come to between the said *David Lionel Beddington* and the Plaintiff *Henry Edward Beddington*, *James Whitaker*, and his mortgagees, by an indenture, dated the 17th of February, 1882, and made between *John Burton*, *John William Burton*, and *Henry Burton*, of the first part, *James Whitaker* of the second part, and the Plaintiff *Henry Edward Beddington* of the third part, granted and conveyed the first-mentioned piece of land with the messuages thereon and passage in rear thereof, subject to and with the benefit of such rights of way as therein mentioned, together with the ways, paths, passages, lights, rights, easements, and appurtenances to the same hereditaments, or any part thereof, belonging, to the use of the Plaintiff *Henry Edward Beddington* in fee simple discharged from the mortgage, but subject as to the messuage No. 200, *Uxbridge Road* to the lease to *Hartshorn* dated the 25th of August, 1881, and as to the messuage No. 202, *Uxbridge Road*, to the lease to the Plaintiff *Bellinger*, dated the 15th of September, 1881.

On the 4th of January, 1882, *James Whitaker* agreed to sell to the Defendant the piece of freehold land situate at the rear of Nos. 200 and 202, and also of Nos. 196 and 198, *Uxbridge Road*, and by an indenture, dated the 2nd of May, 1882, the said piece of land was conveyed by *James Whitaker* to the Defendant.

The houses obtained their light to an important extent from over the piece of land sold to the Defendant. The Defendant had commenced building on the piece of land so as to obstruct the light to the houses. This action was brought by the Plaintiffs *Beddington* and *Bellinger* for an injunction and damages.

On the 27th of November, 1885, an injunction was granted in terms of the claim until the hearing of the action.

The action now came on for trial. It appeared that the lease to *Hartshorn* of the 25th of August, 1881, had been determined, the Plaintiff *Beddington*, on the 16th of September, 1882, having brought an action against *Hartshorn* to recover possession, in

which action he recovered judgment, and possession was accordingly delivered.

Witnesses were examined in Court, but before the argument on the legal question commenced an arrangement was come to with regard to the wall and buildings in rear of No. 202, *Uxbridge Road*, so that the only question to be considered was with regard to the Plaintiff *Beddington's* rights in respect to the access of light to No. 200, *Uxbridge Road*.

Romer, Q.C., *D. L. Alexander*, and *Raphael*, for the Plaintiffs:—

The conveyance to the Plaintiff *Beddington* was anterior to that to the Defendant, and in that conveyance there is at all events an implied grant of light, and we submit that the Defendant has no right to obstruct our lights. *Wheeldon* v. *Burrows* (1) lays down the principles applicable to implied grant, one of which is that on the grant by the owner of a tenement of part of a tenement, there will pass to the grantee all those continuous and apparent easements which are necessary to the reasonable enjoyment of the property granted: *Palmer* v. *Fletcher* (2). Priority in time of the conveyance is a material point for consideration: *Swansborough* v. *Coventry* (3), and *Tindal*, C.J., there says (4): "It is well established by the decided cases, that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can anyone who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights. The principle is laid down by *Twisden* and *Wyndham*, JJ., in the case of *Palmer* v. *Fletcher*, 'that no man shall derogate from his own grant.'" The case of *Compton* v. *Richards* (5) is to the same effect. In *Allen* v. *Taylor* (6), where the owner of a dwelling-house and adjoining land sold the house to one person, and the land to another, under contemporaneous conveyances, it was held that the purchaser of the land was not entitled to build thereon so as to obstruct the lights of the house.

(1) 12 Ch. D. 31.
(2) 1 Lev. 122.
(3) 9 Bing. 305.
(4) 9 Bing. 309.
(5) 1 Price, 27.
(6) 16 Ch. D. 355.

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Even if the Court should be against the implied grant in the conveyance, we say we have at least an absolute grant of the right for the residue of the term of twenty-one years granted to *Hartshorn* by the lease from *Whitaker* of the 25th of August, 1881. The forfeiture of the lease does not terminate the right to the light: *Russell* v. *Watts* (1).

[They also referred to *Allen* v. *Seckham* (2).]

Sir *Arthur Watson*, Q.C., and *F. Thompson*, for the Defendant:—

We do not question the fact that the Plaintiff's conveyance was prior in date to ours, but our contract was dated the 4th of January, 1882, whereas the Plaintiff's was later, that is, on the 19th of January, 1882, and from the date of the contract to us, which was a valid contract, the vendor, *Whitaker*, was a trustee of the property for us. The purchaser was the real beneficial owner in the eye of a Court of Equity of the property, and the vendor was not a mere dormant trustee, but a trustee having a personal and substantial interest in the property. The relation of trustee and *cestui que trust* subsisted, subject, however, to the paramount right of the trustee to protect his own interest as vendor: *Shaw* v. *Foster* (3).

The conveyance to the Plaintiff contains no express grant of light—it contains only the general words. The Plaintiff did not stipulate expressly for any grant of light over the adjoining land. General words in a grant must be restricted to that which the grantor had then power to grant: *Booth* v. *Alcock* (4). In the absence of express reservation there is no implied reservation to the grantor: *Swansborough* v. *Coventry* (5).

No implication arises upon the deed itself. The deed is a simple conveyance. In *Swansborough* v. *Coventry* and *Compton* v. *Richards* (6) the Courts gathered from the deeds and the agreements between the parties what was the intention, and found from the circumstances of the title, and the construction of the instruments before them, that there was enough to bring in the implication. *Whitaker* being at the date of the conveyance to the

(1) 10 App. Cas. 590.
(2) 11 Ch. D. 790.
(3) Law Rep. 5 H. L. 321, 338.
(4) Law Rep. 8 Ch. 663.
(5) 9 Bing. 305.
(6) 1 Price, 27.

Plaintiff seised in fee of the house for his own benefit, and also seised in fee of the adjoining land, as we say as trustee for us, is the Court to hold that there is an implied grant in the conveyance to the Plaintiff injuriously affecting the land of which he is a trustee? if so, then he is committing a wrong, and is giving away in substance our property, and rendering himself liable to us as his *cestui que trust*. We submit that the conveyance to the Plaintiff cannot be said to shew any intention to create such a right.

Then as to the Plaintiff's contention that at least he has under the lease for twenty-one years to *Hartshorn* of the 25th of August, 1881, an implied grant of light for the whole of that term, we say that the house was demised for a term determinable, and the lease containing a condition of re-entry, and the landlord having re-entered, that determined the lease. It would be absurd to say that the implied grant was for a longer term than the actual grant, and was not determinable under the condition, but was for a term absolute of twenty-one years.

[They also referred to *Rigby* v. *Bennett* (1) and *Coke* upon *Littleton* (2).]

Romer, in reply:—

I claim an express grant of light by virtue of the *Conveyancing and Law of Property Act*, 1881, s. 6, sub-s. 2, which enacts that a conveyance of land having houses on it shall be deemed to include, among other things, all lights appertaining to the land or houses, or at the time of conveyance demised, occupied, or enjoyed with the land or houses conveyed, and inasmuch as those lights were actually enjoyed with the house at the time of the conveyance, I say there is an express grant of such lights to the Plaintiff *Beddington*.

[He also referred to *In re Northumberland Avenue Hotel Company* (3).]

CHITTY, J.:—

The question for decision is that relating to the Plaintiff *Beddington's* claim to light in respect of the house No. 200, of

(1) 21 Ch. D. 559. (2) Page 42 a.
(3) 33 Ch. D. 16.

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which he is the owner in fee simple, subject to a tenancy which he has created since the action was commenced.

The Plaintiff claims the right on three grounds: first, by implied grant at least for a term of years by virtue of the lease granted to *Hartshorn* on the 25th of August, 1881; secondly, by implied grant under his conveyance; and thirdly, by express grant in his conveyance. The point of express grant was not raised until the reply. The question of express grant would naturally come first, but it will be convenient to deal with the questions in the order in which they were argued.

The Plaintiff and Defendant claim under the same person, one *Whitaker*, who bought the property, that is to say, the alleged dominant and the alleged servient tenement, in 1880. In that year the day after the conveyance was made to him he mortgaged the property. The legal estate passed under the mortgage, and was outstanding until it was got in, as I shall presently mention.

At the commencement of the transactions which I am now going to mention, *Whitaker* had an equitable estate in the land only, though of course he had the right to acquire the legal estate on payment of the mortgage debt.

The first fact to be mentioned is that the house in question was built before the 25th of August, 1881, and on that day *Whitaker* demised it by deed for a term of years to *Hartshorn*. At that time *Whitaker* had an equitable estate in the adjoining land, and for the convenient enjoyment of the house so demised access of light over this adjoining land was requisite. I am satisfied that in these circumstances equity would follow the law. The law is simply this; where a man is the owner of a house and the owner also of an adjoining field, and he grants the house, he grants by implication a right of light over the adjoining field so far as is necessary for the proper enjoyment of the house. Consequently, on the demise to *Hartshorn*, he obtained for his term the right to light as against the landlord, who was the owner in equity of the adjoining land. I am satisfied, as I have said, that although the title here is altogether equitable, equity would follow the law. I am not forgetting that at law as between the landlord and the tenant, by virtue of the doctrine of estoppel, a

term passed to the tenant and a reversion capable of being assigned vested in the landlord. It has been decided that there would be a legal tenancy, though it arose out of an equitable title in the landlord. That is founded on the special law of landlord and tenant, which precludes the tenant from disputing his landlord's right to make the demise. Of course the tenant in such a case is liable to be ejected by the person in whom the legal estate is vested: and in the case before me *Hartshorn* was liable to be ejected by *Whitaker's* mortgagees, who were not parties to the lease. So far the case is free of doubt.

What happens afterwards is this: *Hartshorn's* lease has been determined by the Plaintiff, who subsequently acquired the reversion. I am dealing with these facts quite distinctly, because it is a distinct head of claim on the part of the Plaintiff. On the 16th of September, 1882, the Plaintiff brought an action against *Hartshorn* to recover possession of the property included in the lease. He recovered judgment, and on that judgment possession was delivered. The Plaintiff now contends that the implied grant by way of demise of the access of light over the adjoining tenement was an absolute grant for the term of twenty-one years, being the term for which the house was demised to *Hartshorn*. It appears to me that that contention is erroneous in point of law. The house was demised for a term determinable. There was a condition of re-entry, and the right to re-enter under the condition having arisen, and the landlord having re-entered, the lease was duly determined. It is, to my mind, a singular proposition to say that the implied grant was for any longer or other term than the term actually granted: that is to say, that it was not for a term determinable under the condition, but was for a term absolute of twenty-one years. Dealing with this point on principle I cannot conceive how it is possible to maintain such a proposition. I think that lease was wholly determined both as to the houses comprised in it and as to the right of light, which had no separate existence. According to the Plaintiff the right to light continues to exist as a sort of right in gross. It was said there were some observations of Earl *Selborne* in his speech in the House of Lords in the case of *Russell* v. *Watts* (1), which shewed that the

(1) 10 App. Cas. 590.

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forfeiture of this lease would not determine the right to the light. Earl *Selborne's* observations had reference to the very special circumstances of that case, and he did not intend to lay down any such general rule as the Plaintiff contends. For these reasons I hold that the Plaintiff cannot succeed by virtue of the implied but limited grant of light contained in the lease of the 25th of August, 1881.

Now I come to the question of the implied grant by virtue of the conveyance to the Plaintiff, and no doubt this question presents some difficulties. I will state the facts a little more in detail. The Defendant entered into a contract with *Whitaker* on the 4th of January, 1882, for the purchase of the plot of ground which is the alleged servient tenement. That agreement was in writing. A part of the purchase-money was paid at the time; and under this contract the Defendant was entitled to have conveyed to him the property free of incumbrances. This contract with the Defendant was afterwards carried into execution and a conveyance was subsequently executed; and it is admitted that the conveyance executed was in performance of this contract. The effect of this contract on the land comprised in it is clear. I prefer to read the words of Lord *Cairns* in the well-known case of *Shaw* v. *Foster* (1) rather than state it in my own language, he says (2): "Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity, between the vendor and purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property." In *Rose* v. *Watson* (3) Lord *Westbury* explained how

(1) Law Rep. 5 H. L. 321. (2) Law Rep. 5 H. L. 338.
(3) 10 H. L. C. 672.

the payment of the purchase-money transferred the proportionate part of the interest in the land equitably to the purchaser. The contract, as I have said, was duly performed. On the face of the contract no objection could have been raised. It was a binding contract, binding the land and gave the Defendant *Atlee* an equitable title commencing from that day. The conveyance to the Defendant was made on the 2nd of May, 1882. That is his title. The mortgagees joined in the conveyance to him. The mortgagees had been paid off in the month of March previously. There is another right that I have not yet mentioned and which accrued to the Defendant under his contract to purchase. He was entitled to require the mortgagor to pay off the mortgage debt so as to enable the purchaser to get in, as he in fact did get in, the legal estate in possession free from incumbrances.

Now I go to the title of the alleged dominant tenement, that is to say, the title to the house. There were negotiations on the part of the Plaintiff *Beddington* or his agent which commenced on the 4th of January, 1882, if not at some period before that date. But I am satisfied that there was no contract on the part of *Beddington* to buy the house until the formal contract of the 19th of January, 1882, was signed. Mr. *Romer*, who was not disposed in this case to give up any point, did give that point up in the course of the argument. There was a question raised by him whether the letters did not constitute some binding agreement, but on consideration he advisedly gave it up, and I am not called upon to give any judgment upon it. I mention this lest there should be any misapprehension anywhere else. The result, then, is that, so far as the titles depend upon the contracts, the Plaintiff's title to the house is a title subsequent to the Defendant's, the dates standing thus: 4th of January, 1882, Defendant's contract, and 19th of January, 1882, Plaintiff's contract.

Then when it comes to the conveyances, the position of the parties is inverted, and the Plaintiff, who had the second contract, obtained the first conveyance. The conveyance to the Plaintiff was dated the 17th of February, 1882, and in that conveyance the mortgagees joined. The conveyance states the facts accurately. The sale was by *Whitaker*, the mortgagees

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joining merely for the purpose of giving effect to his contract by conveying the legal estate in the house in question, with others, to the Plaintiff *Beddington*. The deed describes the parcels and refers to a plan, but neither in the parcels nor in the plan, nor in any part of the deed, is any mention made of the ownership or occupation of the adjoining land. The deed is silent in every part of it with reference to any interest *Whitaker* or his mortgagees had in the alleged servient tenement. The deed contains, subject to a question I shall afterwards have to consider, no express grant of lights. It does contain, however, the words, which were useless, "together with lights and appurtenances to the hereditaments or any part thereof belonging or appertaining;" those words, of course, standing by themselves, were quite unnecessary, because everything that was appurtenant would pass and anything that was not appurtenant, that is to say, not appurtenant in law, or not already annexed in law to the house, would not be comprised in those words. It is quite plain, on the facts, that the Plaintiff *Beddington* did not, in his contract or otherwise, stipulate expressly for any grant of light over the adjoining land, although undoubtedly he bought the house in the condition in which it was.

Now I go to the question which has been so much argued, as to the grant to be implied on the conveyance. The first observation I make is this: on reading the conveyance no implication whatever arises. It is not like the case of an implied grant when, upon reading the instrument, you say the terms employed mean so and so; and it is necessary, in order to give effect to the intention, as manifested by the deed, to imply something which is not expressed in so many words. In this case, in order to raise any implied grant, it is necessary to look outside the deed of conveyance, and to consider the surrounding circumstances. That observation appears to me to be important. It is necessary to make an inquiry in regard to the adjoining land, that is to say, the alleged servient tenement. To make what I have said plain, I will put it in this way: if the adjoining land is owned by a stranger, of course there is no implied grant. The allegation that there is an implied grant over the adjoining land necessarily involves an investigation of the circumstances, and especially of

the title, to the adjoining land. As I say, where a stranger is the owner there is no implication whatever; but if the grantor, —I am now taking the simple case as the best illustration—who is seised of the fee simple in law of the house, is shewn by proper evidence to be also seised in fee simple of the field, then the implication arises, but not till then perfectly. If it appears that the grantor of the house has a term, and only a term, in the adjoining land, then the implied grant would be to the extent of the term, and not more. If he has got a short and temporary interest, the implied grant would be only to the extent of the short and temporary interest. That appears to me to be a plain way of reasoning out the case according to principle.

The result is that the Court is necessarily thrown upon an investigation of the title to the adjoining land. In connection with this point I refer to the case of *Booth* v. *Alcock* (1), which decides that the general rule that a grant operates at law to convey only what the grantor has at the time of the grant applies to implied grant as well as to express grant, and accordingly that on the question of an implied grant of light over adjoining land it is necessary to ascertain what interest the grantor had in the adjoining land at the time of the grant.

Cases have been cited and commented upon with regard to the doctrine of implied grant. The maxim is, that the grantor shall not derogate from his own grant. That is a compendious way of stating this head of law, it embodies the principle upon which implied grant has been founded. In the cases at law before the *Judicature Acts*, and I may say before the *Common Law Procedure Act*, a Court of Law did not recognise equitable titles. I am speaking of a general and not of an absolute rule. Consequently, when the Court was asked to raise implication, the Court of Law did not in the cases referred to go into any question of equitable title. However, in *Compton* v. *Richards* (2) and *Swansborough* v. *Coventry* (3) the Court appears to some extent to have proceeded on matters relating to the adjoining land, which were outside the grant itself.

In *Swansborough* v. *Coventry* the Court had before it the plain-

(1) Law Rep. 8 Ch. 663.
(2) 1 Price, 27.
(3) 9 Bing. 305.

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tiff's deed, which described the dwelling-house conveyed to him as "bounded on the east by a piece of ground, described in the particulars of sale as a piece of freehold building ground, constituting Lot 11 at the aforesaid sale, purchased by *John Coventry*." The Court put a construction on this description of the adjoining land—I am not called upon to express any opinion as to the correctness of the construction adopted by the Court—they held that there was an implied grant of light not extending to what was required for the enjoyment of the house, but limited by the description of the adjoining land as building land, and that there was a right to build upon the servient tenement to the height of some old buildings which stood there, but the height of which was not shewn on the conveyance, but was shewn by extrinsic evidence.

The decision in *Compton* v. *Richards* (1) was, according to the judgment of two of the Judges, put upon an agreement between the parties, though *Wood*, B., seems to have rested it rather on implied grant.

But the case before me has to be decided under the *Judicature Acts*, which require a full recognition of equitable interests. It appears to me that before I raise this implied grant as against the Defendant I must fairly look at the circumstances. Sir *Arthur Watson*, in his argument, put by way of illustration the case that I am about to state. Suppose the grantor is seised in fee simple of both the house and the adjoining land, but seised of the house for his own benefit, and of the adjoining land simply as trustee for somebody else. Is the Court, having those circumstances before it, to hold that there is an implied grant by him affecting the land, and injuriously affecting the land of which he is trustee? I say injuriously affecting the land, because the supposed case is one in which it is assumed that at the date of the conveyance of the house the house has no right of light; that it is a new house to which no right of light is attached. Mr. *Romer* met this boldly by acknowledging that the effect of his argument would be to create a right of light for the house over the adjoining land, which would thus be turned into a servient tenement. That appears to me to be a strange result,

(1) 1 Price, 27.

because it would make a man who has no intention of doing so commit a wrong, and give away in substance part of the property of another person for whom he is trustee, and to whom he would render himself liable for his wrongful act. All this is to be done by virtue of an implication raised on an innocent conveyance which does not disclose any intention to create the easement, and where the true intention of the parties is to create no such right.

Now let me stay for one moment to consider the argument that the Plaintiff claims the right as a purchaser for value without notice. There is no pleading to that effect on the part of the Plaintiff, but I should make all proper amendments which would enable me to do justice, and I should not dispose of the case as against the Plaintiff on the ground that he has not pleaded this point if I thought it could be maintained on the facts proved. Now it was urged that the implied grant arises as a matter of law, and that it operates to convey a legal right to the Plaintiff; and that the Plaintiff being purchaser for value of the house, is also purchaser for value of this legal right. But he is not purchaser without notice. If the Plaintiff had been actually bargaining for any right over the adjoining land, and bargaining, as it must be in this case and similar cases, for a right to be created *de novo*, he would be bound to investigate the title to the adjoining property, and in the simple case put by way of illustration he would necessarily, on investigating his title, find that his grantor had the legal estate in the adjoining land merely as trustee for somebody else. In other words, he would necessarily come upon the trust, and I think that both the trustee and the *cestui que trust* would be entitled to say that if the grantee had investigated the title he would have found what every honest vendor would have disclosed.

I now come to the exact case, which is that at the date when the conveyance to the Plaintiff was executed the Defendant had an equitable title of the nature described by Lord *Cairns* in *Shaw* v. *Foster* (1), and I say that if there had been any inquiry made into the title of the adjoining land it would have been the duty of *Whitaker* and his advisers to disclose the fact that he had already sold it, that is, in other words, to disclose the equitable

(1) Law Rep. 5 H. L. 338.

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title of the Defendant. But there was no such investigation in this case. Therefore I think that a plea on the part of the Plaintiff that he was a purchaser of the supposed legal right without notice could not be maintained.

Other similar cases might be put by way of illustration. I think I have put one of the strongest, and the result in this question of the implied grant of the lights by virtue of the conveyance appears to me to be that the Court ought not to raise an implication under such circumstances as are before me. It would be doing an injustice to the Defendant, and would probably render *Whitaker* liable to him by virtue of his covenants contained in the subsequent conveyance to the Defendant.

I have dealt with the case hitherto without having particularly considered the effect of the mortgage. The mortgagees, as I have said, had the legal estate in both properties and joined in the conveyance to the Plaintiff. The Plaintiff says: "I claim this implied grant of the light by virtue of the legal estate that was in the mortgagees—the mortgagees had at the date of the conveyance the legal estate in the adjoining property—and as against them (and that is all I care about) I am enabled to assert the legal right." The Plaintiff says by his counsel that the mortgagees were not bound by the contract entered into with the Defendant on the 4th of January, 1882, and consequently, the legal estate remaining in the mortgagees in the alleged servient tenement, the implication ought to be allowed. I think that it ought not, for the reasons I have already stated, namely, that the Court is thrown upon an inquiry, before it allows the implication, as to the title to the adjoining land. The mortgagees joined in the conveyance merely for the purpose of conveying the legal estate in performance of the mortgagor's contract, and not for the purpose of creating any additional right or any new right of light over the land which had already been sold to the Defendant. The result, therefore, is, that I think the Plaintiff fails with regard to the implied grant.

Now I come to the further question as to the express grant. The words of the conveyance to the Plaintiff in regard to lights are those which I have read. The Plaintiff, however, says that sub-sect. 2 of the 6th section of the *Conveyancing and Law of*

Property Act, 1881, has given him that which is not on the face of the conveyance itself. The substance of that sub-section is this: that the conveyance of land having houses on it, operates by virtue of the Act to convey with the land the lights at the time of the conveyance enjoyed by the house. Then the Plaintiff says that inasmuch as these lights were—and he is quite right in point of fact—actually enjoyed at the time of the conveyance, therefore there is an express grant to him of the lights. No doubt these words do carry the Plaintiff's case beyond what the law otherwise would have done, and far beyond what the deed itself does. Conveyancers had previously to the passing of this Act invented a form which carried not the appurtenances merely such as are strictly so in law, but carried rights which were usually enjoyed at the time of the conveyance, the effect of which was in many cases to grant *de novo* a right. I am bound then to read into the conveyance the words of sect. 6, sub-sect. 2, unless the 4th sub-section applies. The 4th sub-section runs thus: "This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained." The question is, whether the deed which mentions the appurtenances thereto belonging in such a form as to shew that only appurtenances strictly so called would pass, is a sufficient expression of a contrary intention. There are many other Acts which contain phrases similar to this which have not been referred to in the argument, and I do not wonder at it, because counsel had a great deal to do considering the number of arguments they had to deal with. There is not an expression of a contrary intention in so many words. What there is in the deed is an expression that something shall pass, and something less than would pass under the Act, and the question is, whether the maxim *expressio unius est exclusio alterius* is strong enough to apply to such a case as is before me. But I refrain from deciding the point, because I think it does not really arise. It appears to me that whether the Plaintiff claims by express grant or implied grant he is equally thrown upon the investigation of the title to the adjoining land; and that the observations I have made with regard to the implied grant apply.

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The case is unquestionably full of points, but the result of my judgment is in favour of the Defendant with regard to the house No. 200, *Uxbridge Road.*

Solicitors: *H. Montagu*; *Simpson & Cullingford.*

G. M.

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1887
Feb. 4, 11

In re ROYAL LIVER FRIENDLY SOCIETY.

Friendly Society—Friendly Societies Act, 1875 (38 & 39 *Vict. c.* 60) [*Revised Ed. Statutes, vol. xvii., p.* 663]—*Disputes—Certiorari—Jurisdiction.*

The provisions in the *Friendly Societies Act*, 1875, ss. 22 (*d*) and 30, sub-s. 10, for the reference of all disputes between the society and its members to the County Court, are permissive only, and not peremptory; and therefore there is, in a proper case, jurisdiction to remove to the High Court by *certiorari* proceedings in an action commenced against a friendly society by one of its members.

MOTION.

In this case an order *nisi* had been obtained for a *certiorari* to remove from the *Liverpool* County Court to the High Court proceedings taken in the County Court by two members of the *Royal Liver Friendly Society* to have it declared that the payment of a sum of £1500 in respect of certain costs was *ultrà vires* on the part of the society; and cause was now shewn against making absolute the order *nisi.*

The *Royal Liver Friendly Society* was a friendly society established in 1850 under the provisions of the Act then in force; the registered office being in *Prescot Street, Liverpool*, with agents in every part of the *United Kingdom.* At a meeting of the society held in *Bristol* on the 21st of July, 1886, new rules were certified in accordance with the *Friendly Societies Act*, 1875 (38 & 39 Vict. c. 60). Of these rules rule 7, which was alone material to the present case, provided:—"The provisions of sect. 30 of the *Friendly Societies Act*, 1875, apply to this society, and are hereby incorporated with the rules of this society, and whenever the words 'the society,' 'a society,' or 'any society' occur they shall be held to include the *Royal Liver Friendly Society.* The provisions of the said section are as follows:—'(10.) In all disputes

between a society and any member or person insured, or any person claiming through a member or person insured, or under the rules, such member or person may, notwithstanding any provision of the rules of such society to the contrary, apply to the County Court or to the Court of summary jurisdiction for the place where such member or other person resides, and such Court may settle such dispute in manner herein provided.' "

At this meeting a resolution was also passed for the adoption and payment of the legal and other expenses (amounting to about £1600) incurred in conducting an inquiry by a syndicate as to the affairs and management of the society.

Two members of the society objected to the proposed payment as *ultrà vires*, and having taken proceedings in the *Liverpool* County Court to obtain a declaration to that effect, a rule *nisi* for a *certiorari* was obtained on behalf of the society.

R. Neville now shewed cause against the rule :—

If this Court has jurisdiction it may be admitted that the case is one for granting a *certiorari*, but I submit that this Court has no jurisdiction to deal with the case. By the *Friendly Societies Act*, 1875 (38 & 39 Vict. c. 60), ss. 22 (sub-s. (*d*)) and 30 (sub-s. 10), exclusive jurisdiction to deal with all disputes between members of a society and the society or its officers is given to the County Court. Under the similar provisions of the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42), it has been held that the jurisdiction of the High Court to entertain proceedings between a building society and its members is ousted, and that the decision of the tribunal provided by sect. 36 of that Act is binding and conclusive : *Municipal Permanent Investment Building Society* v. *Kent* (1). And by the rules of this society it is expressly provided that "the provisions of sect. 30 shall apply to this society, and are hereby incorporated with the rules of this society." If, however, it can be said that the direction in the rules as to settlement of disputes under sect. 30 (sub-sect. 10) is invalid, then sect. 22 (sub-sect. (*d*)) provides that where the rules contain no direction as to disputes, the member or person aggrieved may apply either to the County Court or to a Court of summary jurisdiction, which

(1) 9 App. Cas. 260.

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may hear and determine the matter in dispute, and by the same section, where the dispute is decided under the rules, the jurisdiction of the High Court is expressly excluded in favour of the cheaper and more speedy local tribunal.

Romer, Q.C., and *Rutherford, contrà*:—

Unless exclusive jurisdiction has been conferred upon the County Court we are entitled to have the rule for a *certiorari* made absolute. The provisions contained in the *Building Societies Act*, 1874, on which the majority of their Lordships in *Municipal Permanent Investment Building Society* v. *Kent* (1) held that the jurisdiction of the superior Courts to deal with internal disputes in a building society has been ousted, are conspicuous by their absence in the *Friendly Societies Act*, 1875, on which the question here turns. To oust the jurisdiction of the High Court it is not enough that the rules have so provided: there must also be clear enactment that the County Court alone shall hear and decide the dispute: *Mulkern* v. *Lord* (2) (*per* Earl *Cairns*, assented to by Lord *Blackburn* (3)). The effect of sects. 22 and 30 is that, while the jurisdiction of the County Court is not to be ousted altogether by any provisions in the rules of a friendly society for settling disputes between the society and its members, the County Court has not exclusive jurisdiction, and the provisions of those sections are permissive only, and do not take away the jurisdiction of the High Court. Then we submit that this is not a dispute within sect. 22 of the Act, which must be confined to disputes the determination of which will settle the rights and liabilities of individual members either under the rules or under their policies of insurance: *Mulkern* v. *Lord*; *Sinden* v. *Bankes* (4).

[CHITTY, J.:—An individual member complains that the funds in which he has an interest are being dealt with in a manner inconsistent with the rules and to his injury as a member of the society. Surely that is a dispute within sect. 22 (*d*) between the society and a member?]

This contention was abandoned.

Seddon, in reply for *Neville*.

(1) 9 App. Cas. 260.
(2) 4 Ibid. 182.
(3) 9 App. Cas. 278.
(4) 30 L. J. (Q.B.) 102.

CHITTY, J.:—

It was admitted on behalf of the Plaintiffs in the County Court action that, having regard to the nature and magnitude of the claim the case was one fit for a *certiorari* and proper to be removed into the High Court, if the High Court had any jurisdiction in the matter. The argument was directed to this point,—that the effect of the statutes relating to friendly societies, and affecting this society in particular, was to exclude the jurisdiction of the High Court, and to confer jurisdiction exclusively on the County Court. Of course, the burden of making out that proposition lay upon the Plaintiffs; and the question is, whether the jurisdiction of the High Court is excluded. That question depends on the *Friendly Societies Act*, 1875, of which sects. 22 and 30 are material.

Sect. 22 provides that every dispute between a member and the society, or an officer thereof, "shall be decided in manner directed by the rules of the society, and the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of Law or restrainable by injunction; and application for the enforcement thereof may be made to the County Court." That section, therefore, renders it necessary to refer to the rules of the particular society in order to see whether the rules do provide the manner in which disputes of this nature are to be settled. The argument that this dispute was not a dispute within sect. 22 obviously could not be sustained, and was abandoned. The dispute in this case is unquestionably a dispute of the nature mentioned in sect. 22. Then sub-sect. (*d*) provides: "Where the rules contain no direction as to disputes, or where no decision is made on a dispute within forty days after application to the society for a reference under its rules, the member or person aggrieved may apply either to the County Court, or to a Court of summary jurisdiction, which may hear and determine the matter in dispute." That sub-section, therefore, so far as the person aggrieved is concerned, is permissive only, and, so far as the County Court and the Court of summary jurisdiction are concerned, confers jurisdiction on them. But it does not in terms, and I think it does not in substance, on its true construction, exclude the jurisdiction of the High Court. There are no negative words and no words of exclusion.

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I turn now to sect. 30, which has been slightly amended (see 42 & 43 Vict. c. 9), but the amendment is immaterial for the present purpose, it being admitted that this is a society within the scope of the first part of the section, *i.e.*, which receives contributions by means of collectors at a greater distance than ten miles from the registered office. As this society was in existence at the commencement of the Act, all the provisions of sect. 30 are, by sub-sect. 13, made applicable. Sub-sect. 10 provides: "In all disputes between a society and any member or person insured, or any person claiming through a member or person insured, or under the rules, such member or person may, notwithstanding any provisions of the rules of such society to the contrary, apply to the County Court or to the Court of summary jurisdiction for the place where such member or other person resides, and such Court may settle such dispute in manner herein provided." That again is a permissive section, giving the member the right to resort to the County Court or to the Court of summary jurisdiction, but again not conferring exclusive jurisdiction on those Courts. The effect of the section is that if there should be found in the rules a provision ousting the jurisdiction of the County Court, or of the Court of summary jurisdiction, that provision is not to take effect against the statutory enactment. The statutory enactment, therefore, overrides any rule which provides that the member may not go to the County Court or may not go to the Court of summary jurisdiction. The effect of sect. 30, therefore, is that the provisions of this section do, and from the enactment itself must, apply to this society.

Turning to the rules of this society, which were framed in 1886 (subsequently, that is to say, to the Act of 1875), rule 7, the only rule material to be considered, states that the provisions of sect. 30 apply to this society, and are thereby incorporated; and then the rule sets forth *verbatim* the provisions of that section. It correctly states, therefore, that the society is governed by sect. 30, and in stating what the provisions of that section are it mentions sub-sect. 10, the effect of which I have already stated. For the purpose of answering the question whether the rules of this society do contain any direction as to the manner in which disputes shall be decided, I turn again to sect. 22, and the

answer appears to be, they do not. Sub-sect. 10 of sect. 30 merely enacts that in such disputes the member aggrieved may go to the County Court or Court of summary jurisdiction, notwithstanding any provision to the contrary to be found in the rules. In these rules there is no provision to the contrary; but with the exception of rule 7 there is no rule whatever on the subject of how disputes are to be settled. The result, therefore, appears to be that jurisdiction has been conferred on the County Court, but the jurisdiction conferred is not exclusive. After going through these sections it is hardly necessary to contrast this case with that before the House of Lords—*Municipal Permanent Investment Building Society* v. *Kent* (1). The substantial ground upon which the judgment of the House of Lords turned will be found in Lord *Blackburn's* address (2), and it is sufficient for me to say that the House found (there was some difference of opinion, but I am bound by the judgment of the House of Lords) sufficient words excluding the jurisdiction of the High Court. There are no such provisions in the Act before me as were to be found in the Act (*Building Societies Act*, 1874) on which that decision turned. The result, therefore, is that the rule will be made absolute.

Solicitors: *Gregory, Rowcliffes & Co.; Brabner & Court, Liverpool.*

(1) 9 App. Cas. 260.

(2) 9 App. Cas. 277–8.

F. G. A. W.

CHITTY, J.
1887
Feb. 26, 28;
March 8.

In re COUNTESS OF DUDLEY'S CONTRACT.

[1887 D. 303.]

Settled Land Act, 1882, *s.* 60—*Infant Tenant for Life—Power of Sale—Appointment of Persons to exercise Powers of a Tenant for Life.*

Where, in the absence of any trustees of a settlement within the meaning of the *Settled Land Act*, capable of exercising powers of sale over the settled land, an appointment has been made under sect. 60 of persons to exercise on behalf of an infant tenant for life the powers of a tenant for life, and to sell part of the settled estate, the persons so appointed can make a good title without the necessity of appointing under sect. 38 trustees of the settlement to whom notice of the intended sale can be given under sect. 45.

The order made under sect. 60 ought in such a case to direct that the purchase-money be paid into Court.

Adjourned summons.

Under the will of the late Earl of *Dudley*, the present Earl, an infant, was tenant in tail in possession of the *Dudley* estates. The trustees of the will had no power of sale, nor any power to consent to or approve of the exercise of a power of sale.

During the lifetime of the late Earl an arrangement was come to with the *London and North Western Railway Company* for the purchase by them for £1700 of a seam of limestone under the settled estates.

There being no trustees of the settlement for the purposes of the *Settled Land Act* within the definition contained in sect. 2, sub-sect. 8, it was arranged with the company that an application should be made to the Court by the testamentary guardians of the infant Earl for the appointment of persons who could exercise the power of sale during the minority.

Accordingly, on the 22nd of December, 1885, an order was obtained under sect. 60, upon the application of the infant Earl by his mother and testamentary guardian, giving liberty to the Countess of *Dudley*, Lord *Wharncliffe*, and *C. B. Stuart Wortley* (his guardians), to exercise during the minority of the infant Earl and on his behalf the powers of a tenant for life under the *Settled*

Land Acts in relation to the sale of land, and to sell the land in question to the company for the sum of £1700, and giving them liberty in the first instance to receive the purchase-money for the same. It was also ordered that the three persons appointed be at liberty to exercise generally with regard to the settled estates the powers of a tenant for life under the Act on behalf of the Earl during his minority, or until further order; every or any exercise of such general powers to be subject to the sanction of the Judge.

A contract had been entered into by the persons so appointed (the guardians) for a sale of the land to the company, but the company had objected that a good title could not be made on the grounds: 1. that the guardians, being only nominees of the Court, could not exercise the power of sale conferred by the *Settled Land Act* without the appointment of trustees for the purposes of the Act and without giving to such trustees the notices required by sect. 45; and 2. that even if the guardians could exercise such power of sale, they could not give the company a good receipt for the purchase-money, but must elect either to have the same paid into Court or to trustees appointed for the purposes of the Act.

A summons raising the question had been taken out by the company, and was now adjourned into Court.

A. Underhill, in support of the summons:—

The Court can only confer on persons appointed under sect. 60 such powers as can be exercised by a tenant for life. A tenant for life proposing to sell must by sect. 45 give notice of his intention in that behalf to each of the trustees of the settlement, and, where there are none, trustees must be appointed under sect. 38, to whom notice for the purposes of the Act can be given: *In re Ray's Settled Estates* (1); *In re Taylor* (before Court of Appeal 5th of May, 1883).

Even if an appointment under sect. 38 of persons to be trustees under the settlement for the purposes of the Act be unnecessary, the persons appointed by the Court cannot give a valid receipt for the purchase-money.

(1) 25 Ch. D. 464.

CHITTY, J.
1887
In re COUNTESS OF DUDLEY'S CONTRACT.

Romer, Q.C., and *Willis Bund*, for the persons appointed by the order of December, 1885:—

No further appointment of trustees in order to complete the contract for sale is necessary, as the appointment under sect. 60 must be taken to have given the persons appointed all requisite powers. An appointment under sect. 38 of "persons to be trustees under the settlement for the purposes of the Act" would have been without any limit on the exercise of their powers (see sect. 51); and sect. 45, requiring notice to be given to the trustees of the settlement of the intention to sell, would clearly be inapplicable, as persons cannot be required to give notice to themselves, while it is to be observed that by the *Settled Land Act*, 1884, sect. 5, sub-sect. 3, the notice required by sect. 45 of the Act of 1882 may be waived. So also, power having been given to the Court by sect. 60 to appoint, in the absence of any trustees of the settlement, persons to exercise the powers of a tenant for life "in such manner as the Court, &c., orders," it must have been intended that the persons so appointed should be capable of validly exercising such powers—which was the express purpose for which they were appointed—without the necessity of calling another set of trustees into existence.

[They referred to *In re Greenville Estate* (1).]

A. Underhill, in reply.

CHITTY, J. (after stating the facts, proceeded):—

The first objection raised by the purchaser is, that the guardians cannot exercise the power of sale without the appointment of trustees for the purposes of the Act of 1882, and without giving notice to the trustees under sect. 45 of the Act. The question is one of importance, and renders necessary an examination of the leading provisions of the Act. The general scheme of the Act is this: large powers of dealing with the settled estate are conferred upon the tenant for life. Among these powers the power of sale is one of the most important. The existence of trustees is (speaking generally) contemplated throughout the Act. Various duties are imposed upon them,

(1) 11 L. R. Ir. 138.

particularly in relation to capital money. These duties relate to the receipt, the investment, and other application of the capital money, including the application of the money in improvements of the estate as defined by the Act. At the same time provision is made for payment of the capital money into Court and its application under the direction of the Court. In the ordinary case of a tenant for life of full age the notice required by sect. 45 (amended by sect. 5 of the *Settled Land Act* of 1884) must be given to the trustees of the settlement, unless notice is waived by them. The giving of the notice, unless waived, is a condition precedent to the exercise of the powers. These observations apply to the case of a married woman tenant for life, and of a committee of a lunatic tenant for life, acting under the order of the Lord Chancellor. The cases of a married woman and a lunatic are dealt with in the same part of the Act (part xiv.) as that which relates specially to infants. The objection depends principally on sect. 60 taken in connection with the other provisions of the statute.

The point on the construction of sect. 60 is this: Does the term "trustees of the settlement" occurring in that section denote only trustees within the definition of the Act, or does it extend also to trustees appointed by the Court under sect. 38? The definition of trustees is contained in sect. 2, sub-sect. 8, and the trustees, as there defined, consist in substance of two classes: (1) trustees having a power of sale or power of consenting to a sale, and consequently persons to whom the settlor has confided so important a power as that of turning the estate into money, and receiving the money; and (2) persons whom the settlor has declared to be trustees of the settlement for the purposes of the Act: the second class consisting of persons in whom the settlor, with a knowledge of the Act, has thought fit to place confidence of the same high character. If the case had turned solely upon sect. 2, sub-sect. 8, and sect. 60, there would be ground for holding that trustees within the definition were the trustees intended by sect. 60. Where no trustees within the definition have ever existed, then it is plain that the trustees appointed by sect. 38 have no power to sell the estate unless it be under the provisions of sect. 60. In every other case the sale must be by the tenant

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for life, including in that term the various persons who under sect. 38 have the powers of a tenant for life.

The effect of sect. 38 is, then, to declare in express terms that the trustees appointed under it, and the survivor, and the legal personal representatives of the survivor, shall be trustees or trustee of the settlement for the purposes of the Act. This section, therefore, adds to the definition, and in my opinion renders it imperative that the words in sect. 60, "trustees of the settlement," should be construed as extending to trustees appointed by the Court under sect. 38. This conclusion is strengthened by contrasting the expression in sect. 38, "trustees within the definition of this Act," with the simpler expression in sect. 60, "trustees of the settlement." The term, "trustees within the definition of this Act" does not occur in any part of the Act except sect. 38. Turning again to sect. 60, it is plain that when an infant is tenant for life in possession of a settled estate, two distinct cases were contemplated and provided for: the first where there are trustees of the settlement, and the second where there are none; and in both cases sect. 60 authorizes the exercise of the powers of a tenant for life on behalf of the infant. In the first case it is necessarily implied that the trustees exercising the powers shall not be put to the idle ceremony of giving notice to themselves. And it appears to me to follow that as the persons appointed by the Court to exercise the powers on behalf of the infant can be appointed only where there are no trustees, it is likewise necessarily to be implied that such persons are not required to give any notice to trustees.

The true construction of the second part of sect. 60 appears to me to be that the duty of making provision for the due exercise of the powers of a tenant for life is imposed on the Court. This is shewn by conferring on the Court jurisdiction to order in what "manner" the powers shall be exercised, "either generally or in a particular instance." Under this provision the Court has jurisdiction to order, if it thinks fit, that notice shall be given to any remainderman or any other person, though the term "manner" is one of widest meaning.

The result, then, is this: it is not necessary in the present case that any trustees should be appointed under sect. 38; and, having

regard to the terms of the order conferring a power of sale on the infant's guardians as to the particular part of the settled estate, it is not necessary that any notice should be given. Indeed, I think that there is good ground for saying that if trustees were appointed under sect. 38, the powers of such trustees would, under the first part of sect. 60, override or supersede the powers conferred on the guardians. That particular difficulty might be got over by appointing (as would probably be done in such a case as the present) the same persons to be trustees, and to exercise the power of sale in regard to particular lands. But for the reasons I have already stated, I hold that no appointment of trustees is required. From this decision there may possibly result some inconveniences which may not have been directly contemplated by the Legislature. I mention these to shew that I have not overlooked them as possible consequences, though I desire to be understood as not expressing any final opinion on the points. For instance, a sole surviving trustee appointed under sect. 38, or the administrator of such trustee, might have an unrestricted power to sell the mansion-house, where an infant is tenant for life under a settlement (see sect. 38, sub-sect. 2, and sect. 15). The trustee might have been appointed on the application of a previous tenant for life of age, on whose death the infant succeeded to the estate. Such a trustee, or the administrator of such a trustee, might have unfettered liberty to embark in a building scheme (see particularly sect. 16). Further, where an infant and a person of age are tenants for life in common or as joint tenants (see sect. 2, sub-sect. 6), the powers of a tenant for life, so far as regards the person who is of age, cannot (if there are no trustees within the definition) be exercised without the appointment of trustees under sect. 38, and these trustees on their appointment would be trustees capable of exercising the powers of a tenant for life on behalf of the infant; and the Court would, therefore, have no jurisdiction to place restrictions on the exercise of their powers, as it can when it appoints persons to exercise the powers of a tenant for life on behalf of an infant under the latter part of sect. 60. In such a case, however, the Court could protect the interests of the infant by selecting proper persons to be trustees under sect. 38.

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But if any such inconveniences should result from my decision, the answer to any objections founded on them appears to be that the inconveniences are the result of the express and definite language of sects. 38 and 60.

The second objection taken by the purchaser is founded on that part of the order which purports to give liberty to the guardians to receive the purchase-money in the first instance. It is admitted on the part of the vendors that this part of the order cannot be sustained. The order in this respect has been erroneously drawn. It ought, as there are no trustees, to have directed that the money be paid into Court (see sect. 22, sub-sect. 1, and sect. 46, sub-sect. 1). To correct this slip the order must be amended or a supplementary order made.

Solicitors: *C. H. Mason; Benbow, Saltwell, & Tryon.*

F. G. A. W.

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Jan. 25, 29.

[1886 J. 685.]

Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), *s.* 8—*Real Estate descended on Married Woman as Co-heiress—Extent of Separate Use created by sect.* 8.

The 8th section of the *Married Women's Property Act*, 1870, does not enable a woman married after the passing of the Act to pass by an unacknowledged deed the fee simple of real estate descended upon her.

Observations upon a *dictum* of *Jessel*, M.R., in *In re Voss* (1).

M. A. CULL died intestate and unmarried on the 12th of June, 1877, and certain real estate to which she was entitled then descended upon her two sisters, the Plaintiff, Mrs. *Johnson* (a woman married after the passing of the *Married Women's Property Act*, 1870), and *Sarah Cull*, as her co-heiresses at law.

By indenture dated the 20th of June, 1877, the share of *Sarah Cull* in such real estate was conveyed to the Defendant *George Johnson* (the husband of the Plaintiff) upon certain trusts, and by the same indenture the share to which the Plaintiff became entitled as co-heiress of *M. A. Cull* was conveyed by *George Johnson*, and the Plaintiff, his wife, as to the Plaintiff, with the concurrence of her said husband, to *Sarah Cull* and her heirs, to the use of *George Johnson*, his heirs and assigns, upon certain other trusts. This deed was not acknowledged by the Plaintiff pursuant to the *Fines and Recoveries Act*.

This action was for a partition of the property. The Plaintiff at the trial requested a sale; and the usual preliminary inquiry having been directed as to who were the persons interested in the property, and for what estates and interests, and in what shares and proportions, the Chief Clerk in his certificate raised the question whether the unacknowledged deed of the 20th of June, 1877, was operative as to the share of the Plaintiff or her husband in her right expressed to be comprised in the deed, or was only operative as to her life estate and her husband's estate by the curtesy if he survived her.

(1) 13 Ch. D. 504, 505.

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The action now came on for further consideration, and this question was argued.

Baines, for the Plaintiff:—

The policy of the *Married Women's Property Act* was to oust the rights the husband had in his wife's property, and not to give the wife any new or increased power of dealing with that property. Accordingly the enactment in the 8th section of the Act, that where any real estate "shall descend upon any woman married after the passing of the Act as heiress or co-heiress of an intestate, the rents and profits of such property shall . . . . belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same," must be read as conferring upon her a separate use only in such rents and profits as but for the Act might have come to her husband, *i.e.* the rents and profits during her life for which she can personally give receipts; and must not be read as giving her any larger power of dealing with the fee simple of the real estate than she had before the Act. The observations of *Jessel*, M.R., in *In re Voss* (1), that there might be a question whether the expression "rents and profits" in the 8th section did not apply to the *corpus*, is only an *obiter dictum*, as the case arose under sect. 7, which deals only with personal property.

If, however, the wife takes a separate estate in the *corpus*, she could not pass the fee by an unacknowledged deed.

[He also referred to *Troutbeck* v. *Boughey* (2); *Lechmere* v. *Brotheridge* (3); *Taylor* v. *Meads* (4); *Pride* v. *Bubb* (5).]

Willis Bund, for the Defendant:—

The 8th section enacts that the rents and profits of real estate which shall descend upon a woman married after the Act shall belong to her for her separate use, without any limit whatever to the period during which they are so to belong to her, and she consequently takes the whole fee simple in the property, in accordance with the *dictum* of *Jessel*, M.R., in *In re Voss*.

Baines, in reply.

(1) 13 Ch. D. 504, 505.
(2) Law Rep. 2 Eq. 534.
(3) 32 Beav. 353, 358.
(4) 4 D. J. & S. 597.
(5) Law Rep. 7 Ch. 64.

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In this case I have to put a construction upon the 8th section of the *Married Women's Property Act*, 1870; and the question I have to decide is whether the separate use which is created by that section extends to the fee simple of real property which descends upon any woman married after the passing of the Act. The point seems to have been first raised incidentally by Sir *George Jessel* in the case of *In re Voss* (1), which arose upon the 7th section of the same Act relating to personal property, and did not call for any decision upon the question now before the Court.

The question which arose there was whether a woman who, having married after the Act, became entitled, as one of the next of kin of an intestate, to a sum of £600, was entitled to that sum for her separate use, upon the ground that the limit of £200 mentioned in the section applied only to the cases in which the property was derived under a deed or will. Sir *George Jessel* thought that, having regard to the language of the 7th section and the provisions of the 8th section, the limit applied only to money coming to the married woman by deed or will, and consequently that the sum in question being derived under an intestacy, and being unaffected by any settlement, belonged to the married woman for her separate use, and might be paid to her upon her separate receipt, without the necessity of any examination. His Lordship said, however, that it was difficult to find a ground for the distinction, and went on to observe that "there might be a question whether the provision of the 8th section, that the 'rents and profits' of property to which a married woman married after the Act was entitled as heiress should belong to her for her separate use, did not apply to the *corpus*, as the rents and profits were not limited to those arising during her life."

Now the doctrine as to an indefinite gift of rents and profits creating more than a life estate is an old one, and is to be found in *Coke* upon *Littleton* (2), where it is laid down as follows: "If a man seized of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartæ*, the whole land itselfe

(1) 13 Ch. D. 504, 505. (2) Page 4 b. [g.]

STIRLING,J. doth passe; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines, and all whatsoever parcell of the land doth passe." Of course upon the same principle a devise of the rents and profits of land to a man and his heirs would pass the fee; but if the devise were to *A.* without any words of limitation, that, before the *Wills Act*, only passed a life estate, though since the *Wills Act* it would pass the fee. See *Mannox* v. *Greener* (1), where there was a devise to sons and daughters of an equal share in all the income of real property, and it was held that the devise of the income of the estate passed the fee—*Malins*, V.C., in his judgment in that case saying—"I think it is thoroughly settled that before the *Wills Act* a devise of the rents and profits passed a real estate for life. That being the case, that which would give a life estate before the *Wills Act*, by the 28th section of that Act, gives now a fee simple." And His Lordship added that in his opinion there was "no distinction whatever between giving the income of the land and the rents and profits of the land."

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Now I am called upon to apply that doctrine to the construction of this Act, which is not a private estate Act in the nature of a conveyance containing limitations in favour of individuals, but a public Act dealing with the general law relating to married women and their property. And it appears to me that the application of the doctrine requires caution, and that it is a question upon the construction of the Act as to what the real intention of the Legislature was—whether it was intended that the separate use should extend to all rents and profits at whatever time they might arise or be received, or should only extend to rents and profits which might be personally enjoyed by the married woman.

At the time when the Act was passed a husband acquired, by virtue of his marriage with a woman entitled to real estate, a freehold interest during their joint lives, and, on the birth of a child capable of inheriting under the existing limitations in favour of the wife, that interest became enlarged to an estate for the life of the husband; subject to this right, the freehold of the property remained in the wife.

Now, looking first of all at the words of the Act, it is to be

(1) Law Rep. 14 Eq. 456, 462.

observed that they appear more appropriate to rents and profits personally enjoyed by the wife. In the first place there are no words of limitation. It is simply—shall "belong to the woman for her separate use," without the words "and her heirs," or anything of that kind, and there is a provision that "her receipts alone shall be a good discharge." Those words referring to receipts being given by the wife, point to rents and profits for which she was capable of giving receipts, and not to the *corpus* of the property. And in that respect the remarks of *Kindersley*, V.C., in *Troutbeck* v. *Boughey* (1) appear to be in point.

Further, there is this to be considered. If we suppose the rents and profits there spoken of to be rents and profits for all time, the effect would be to give to a married woman an increased power of disposing of the property, that is to say, of the beneficial interest in the property; for there is not a word in the Act which would enable a married woman to deal with the legal estate, or render the legal estate capable of disposition, otherwise than by a deed acknowledged in the ordinary way. If it was the intention of the Legislature that a married woman should have the power of disposing of real estate which has descended upon her, it seems to me that this was an indirect way of conferring that power, and that that intention might have been effected much more readily by a short and simple provision such as is found in the *Married Women's Property Act*, 1882. Finally, the Act, it is to be observed, is one not dealing in a comprehensive way with the property of married women, but in a limited and tentative way, and there is nothing in the Act which shews that more clearly than the preceding section, which gives any amount of personal property to her for her separate use provided it comes to her by virtue of an intestacy, but if the property comes to her under a deed or will, only gives it to her if the amount does not exceed £200. The present section, moreover, only deals with real estate descending on a married woman, and makes no alteration in the law as to real estate coming to a married woman under a deed or will. Looking at all the circumstances, I come to the conclusion that the better view is to hold that the object of the Legislature was simply to remove and put aside the interest of

(1) Law Rep. 2 Eq. 534.

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the husband which interfered with the personal enjoyment of the rents and profits by the wife, and not to give her an enlarged dominion over the property. I hold, therefore, that the separate use created by the *Married Women's Property Act*, 1870, extends only to rents and profits which may come to a married woman so as to be personally enjoyed by her, and accordingly it follows that the contention of the Plaintiff is right.

Solicitors for all parties: *Hughes & Gleadow.*

W. W. K.

STIRLING,J. 1887 *March* 12, 19.

In re COPPARD'S ESTATE. HOWLETT *v.* HODSON.

[1886 C. 4591.]

Will, Construction—Gift of Residue to Children of Nephew to be vested Interests in Sons at Twenty-five Years of Age, and in Daughters at Twenty-five or Marriage—Remoteness.

Testatrix directed that as to one moiety of the residue of her estate the trustees should hold it upon trust for the benefit of the children of her nephew, *W. H.*, to be vested interests in them; as to sons on their attaining the age of twenty-five years; and as to daughters on their attaining twenty-five years, or being married before that age; and in case a daughter should marry under age, power was given to the trustees to settle her share. Power was also given to the trustees to apply the income of an expectant share of any child for maintenance, education, and bringing up; and also to apply half of an expectant share for advancement in life. In case all the children of *W. H.* should die without taking a vested interest, there was a gift over to testatrix's brothers and sister, &c. *W. H.* had seven children, four born before the testatrix's death, all being now infants, and three afterwards. A daughter, one of the four, had married under age:—

Held, that the four children and those only could take, and that the daughter took a vested interest which at present was one-fourth.

Elliott v. *Elliott* (1) followed.

ADJOURNED SUMMONS.

Sarah Coppard, who died on the 8th of September, 1880, by her will made on the 17th of April, 1877, after appointing two executors and trustees; devising to them certain real estate

(1) 12 Sim. 276.

situate at *Pulborough*, upon trust for conversion; and directing that the proceeds should form part of her personal estate; and also directing that sums amounting to £6000, and upwards, over which she had a power of appointment, should be transferred into the names of the trustees, and form part of her personal estate, made numerous specific bequests; and directed all her just debts, funeral and testamentary expenses to be paid. The testatrix then devised and bequeathed all her real and personal estate, including the personal estate thereinbefore appointed, and the produce of her *Pulborough* estate, to her executors for sale and conversion, and directed them to hold £500 upon trust for investment, and to pay the income thereof to her sister for life; and to pay numerous pecuniary legacies, amongst them £200 to her nephew *William Hodson*, free of duty, and then she directed that as to the residue of her estate, including the £500, her trustees should hold the same, as to one moiety thereof "upon trust for the benefit of the children or child of my said nephew *William Hodson* to be vested interests in them as to such of them as shall be sons or son on their or his respectively attaining the age of twenty-five years, or being daughters or daughter on their or her respectively attaining the said age of twenty-five years, or respectively being married before that age which shall first happen, and in case any of such daughters shall be married under the said age, I empower my trustees, if they shall think fit, to have a settlement made of the whole or any part of their or her shares or share on such marriage on such trusts and on such conditions and in such manner as my trustees or trustee shall think right, with power to transfer or pay such daughter's share to the trustees of any such settlement. I empower my trustees or trustee either to apply the income or any part of the income of the expectant share of any of the children or child of my said nephew for his or her maintenance, education, and bringing up, or to accumulate all or any part of such income as part of the original trust estate, with power however for my trustees or trustee to have recourse to any such accumulated income for maintenance, education, and bringing up, and also empower my trustees or trustee to apply not exceeding one half of the expectant share of any such children or child for his or

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her advancement in life." The testatrix then gave the other moiety of the residue of her estate to her trustees to divide the same equally between all her brothers and sister and all her nephews and nieces who should be living at her decease, and continued:—"And in case all the children of my said nephew shall die without taking a vested interest as aforesaid, then I direct that the moiety of my said estate hereinbefore given in trust for such children shall be divided equally amongst such of my said brothers and sisters, and nephews and nieces as shall be living at the time of the decease of the survivor of such children." The testatrix empowered the trustees to invest the said moiety given in trust for the children of *William Hodson* in the funds and securities in the will mentioned. A question having arisen as to whether the gift of the moiety of the residue for the benefit of the children of *William Hodson* was void for remoteness, the Plaintiffs, the trustees, took out, in November, 1886, an originating summons, which was adjourned into Court, asking that the class of persons who were entitled under the gift might be ascertained: and for a declaration whether or not on the marriage, then pending, of the eldest daughter of *William Hodson*, aged nineteen years, she would take a vested interest in any and what share of the moiety, or whether the next of kin of the testatrix were entitled to the said moiety; and that the costs of the application might be provided for.

William Hodson was still living. He had seven children, all infants, at the date of the summons, four of whom were born in the testatrix's lifetime (two at the date of her will and two between that date and the time of her death), and three born since her death. All the children were Defendants, and also one of the testatrix's next of kin. The eldest daughter of *William Hodson* intermarried with *F. T. Pearson*, on the 19th of February, 1887.

A. G. Langley, for the Plaintiffs, stated the facts.

W. Pearson, Q.C., and *Ernest Hatton*, for the four children born in the testatrix's lifetime:—

It is submitted that they are the only persons who are entitled to the moiety. They were lives in being at the testatrix's death,

and to apply to them the doctrine of remoteness is out of the question. The gift is immediate, there being no interposition of a life interest: *Heathe* v. *Heathe* (1); *Singleton* v. *Gilbert* (2); *Scott* v. *Harwood* (3); *Butler* v. *Lowe* (4); *Elliott* v. *Elliott* (5); *Picken* v. *Matthews* (6). Whatever children are entitled under the bequest, those living at the death of the testatrix took vested interests, and the doctrine of remoteness cannot apply to them though it may exclude the others. There might have been a question of divesting, but, the eldest daughter having married, the fund has become distributable, and she is entitled to be paid one-fourth of it. This is not a legacy, but a gift of residue, and all the rules of the Court applicable to such a bequest apply to this case: *Booth* v. *Booth* (7); *In re Harrison* (8); *Re Speight* (9). The word "vested" in this will means indefeasibly, or payable. That was the clear intention of the testatrix, looking at the power she gave to her trustees to make a settlement of the share of any daughter upon her marriage. It was then to be ascertained and paid over to other trustees. The maintenance clause is important; it does not refer to a contingent, but to an expectant share, and it is not limited to infancy. The powers of advancement and investment should be considered in regard to the question of vesting: *In re Edmondson's Estate* (10); *Harrison* v. *Grimwood* (11); *Armytage* v. *Wilkinson* (12); *Berkeley* v. *Swinburne* (13); *Fox* v. *Fox* (14).

Hastings, Q.C., and *E. S. Ford*, for the three younger children born after the testatrix's death:—

It is submitted that the date of the marriage of the eldest daughter is the period of distribution. That event is within the legal limit, and upon the true construction of the will it opened, and let in all the members of the class. The whole scheme of the will is plain. The Court will reasonably construe it, and hold that all the children are provided for.

(1) 2 Atk. 121.
(2) 1 Cox, 68; 1 Bro. C. C. 542, n.
(3) 5 Madd. 332.
(4) 10 Sim. 317.
(5) 12 Sim. 276.
(6) 10 Ch. D. 264.
(7) 4 Ves. 399.
(8) 30 Ch. D. 390.
(9) Not reported.
(10) Law Rep. 5 Eq. 389.
(11) 12 Beav. 192.
(12) 3 App. Cas. 355.
(13) 16 Sim. 275.
(14) Law Rep. 19 Eq. 286.

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R. F. Norton, for the next of kin:—

I contend that the children do not take vested interests at all. As to the four children, their interests are liable to be divested, and they may all die before the time named, and then there will be no life in being to take. The rule against perpetuities applies, and upon the true construction of the will there is an intestacy.

STIRLING, J.:—

If the case of *Elliott* v. *Elliott* (1) be a binding authority it appears to me that it governs this case. That case was decided in the year 1841 after argument, and though I have found no case since that time in which it has been followed, yet, upon the other hand, I have found none which can be said to be directly in conflict with it, or in which it has been dissented from, or even doubted. I also, upon examination of the cases, think that that case is not entirely isolated, for I find that *Kevern* v. *Williams* (2) (which was approved of in *Berkeley* v. *Swinburne* (3)), though it does not go the whole length of *Elliott* v. *Elliott*, tends in the same direction; therefore I think that, under the circumstances, if *Elliott* v. *Elliott* is to be set aside it is for the Court of Appeal to do it and not for me. I hold, therefore, according to the decision in that case, that the persons to take are those only who were living at the death of the testatrix. As to the other point, I am unable to see anything in the will which would justify me in holding that the word "vested" was used otherwise than in its legal sense—vested in interest: I do not think it means vested in possession, or indefeasibly vested, and, consequently, the fund will be divisible between such of the four children living at the death of the testatrix as being sons may attain twenty-five, or being daughters may attain that age or marry. The daughter who has married has at the present time alone become entitled to a vested interest in the fund, her share being at present one-fourth of it.

Solicitors: *Clarke & Calkin*, agents for *Frederick Thomas Pearson, Shoreham*; *Crampton & Warne*, agents for *H. D. Warne, Brighton.*

(1) 12 Sim. 276. (2) 5 Sim. 171.
(3) 16 Sim. 275.

T. F. M.

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STIRLING, J.

1886

Nov. 6, 8, 27; *Dec.* 4, 13.

1887

March 28.

Charity—Commonable Lands purchased by a Railway Company—Rights of Turbary—Rights of Lord of Manor in the Freehold—Allotment of Lands under an Act of Parliament in Trust for supplying Turves to Occupiers of Cottages—Rights of Lord of Manor and Occupiers of Cottages to Fund in Court—Costs.

Prior to 1802 rights of turbary were claimed by the occupiers of certain cottages over large tracts of commonable and waste lands of a manor. In that year an Inclosure Act was passed by which Commissioners were empowered to allot lands in severalty to the lord and other persons interested, and to allot to the lord in trust for the occupiers of the cottages portions of the waste for a turf common to be managed as the lord and the churchwardens and overseers should order and not to be depastured. The Commissioners by their award, made in 1806, allotted unto the lord of the manor, in trust for the occupiers for the time being of the cottages, over 400 acres of waste for supplying turves for fuel for the use of such cottages. The Commissioners also allotted plots to the lord in lieu of his rights and interest in the soil, and they allotted parts of the waste grounds in severalty unto the owners and other persons interested in compensation for their rights.

A railway company took for the purposes of their undertaking part of the land allotted as turf common, and the purchase-moneys were paid into Court.

On a petition by the freeholder of the cottages for the distribution of the fund:—

Held, that the freeholder had no claim against the fund, having only the indirect interest arising from enhancement of rent by reason of the privilege given to the occupiers; that the persons interested were the lord of the manor, the persons claiming under him, and the occupiers of the cottages; and that the rights of the occupiers were in the nature of a perpetuity specially created by the Legislature and were not charitable.

Inquiries directed accordingly.

THIS was a petition for the distribution of a sum of money which had been paid into Court under the *Trustee Relief Acts*. The fund represented the price paid for certain lands ($1\frac{3}{4}$ acres in extent) purchased by the *London and South Western Railway Company* for the purposes of their undertaking.

The purchase was made from the lord of the manor within which the lands were situate, and to whom they gave notice in 1884 to treat under the provisions of the *Lands Clauses Con-*

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solidation Act, 1845, but on a question being raised as to whether there was not a charitable trust the railway company did not proceed strictly under the provisions of the Act; but the contract was carried into effect by the company, after a valuation by a surveyor, paying the purchase-money, £1000, and 5 per cent. added thereto, to the lord of the manor, and the lord executing a conveyance to the company, and then by an arrangement between the parties the money was paid by the lord of the manor into Court as above mentioned, and the petition was presented in order to obtain a decision of the Court as to the rights of the various persons who claimed an interest in the lands, and Lot 59 consisted of 101 acres, but only 1R. and 15P. were taken by the railway company. These were divided into four classes, viz.: the lord of the manor, under whom the *Bournemouth* Commissioners claimed by virtue of an indenture of conveyance of all interest in Lot 62, executed on the 11th of December, 1883, but not actually delivered to them until February, 1886, after the sale by the lord; the owners of certain cottages or tenements whose occupiers were entitled to certain common rights over the lands taken by the railway company; the occupiers themselves of the cottages and tenements; and the Attorney-General, who asserted that the fund was subject to a charitable trust.

The title to the lands was governed by the provisions of a private Act of Parliament which was passed in the 42nd year of *George* III. "for dividing, allotting, and inclosing certain commonable lands and waste grounds within the parish of *Christchurch* and parish or chapelry of *Holdenhurst*, in the county of *Southampton*."

The preamble was, that "whereas there are within the parishes above mentioned certain commonable lands and waste grounds," "and whereas the lands and grounds of the several proprietors in the said commonable lands are now divided into small parcels, intermixed with each other, and the said waste grounds consist of large tracts of commonable pasture land, partly covered with furze and heath, of very little value, and in their present situation are incapable of any considerable improvement; but if the same, or certain parts thereof, were divided into specific shares, and allotted unto and amongst the several owners and proprietors thereof and

persons interested therein, in severalty, in lieu of and in proportion to their respective lands, rights of common, and other rights and interests, the same would be more convenient to them, and might be considerably improved: but as such convenience and improvement cannot be accomplished without the authority of Parliament;" then the Act went on to appoint Commissioners "for dividing, setting out, and allotting the said commonable lands and waste grounds and otherwise carrying this Act into execution." Then it directed a survey to be made of the whole of the lands thereby "intended to be divided and allotted." Then it provided further that certain "fields and inclosures within the said parish of *Christchurch* and the parish or chapelry of *Holdenhurst*" . . . . should be deemed to be part of the lands to be "divided and allotted by virtue of this Act, and shall be divided and allotted accordingly." Then the Act made provision for the payment of the expenses by sale of parts of the waste ground and otherwise.

Then came a series of sections on which the questions raised in the petition turned, "And be it further enacted (13) that the said Commissioners shall, and they are hereby authorized and required to set out and allot unto and for the lords of the several manors respectively in which the said waste grounds are situated, in trust for the occupiers for the time being of all such cottages and tenements containing less than one acre each, as were erected on ancient sites, or have now been erected more than fourteen years, in lieu of their rights or pretended rights, or custom of cutting turves in the said tythings or liberties" (several were named which need not be stated) "and *Week* (commonly called the liberty of *West Stour*), the manor of *Hurn*," and the tythings mentioned, "as shall by virtue of this Act be divided and allotted as aforesaid, so much and such part or parts of the said waste grounds in such respective tythings, manors, or liberties, as the said Commissioners shall think proper, for a turf common, not exceeding in the whole five acres, or less than two acres, for each cottage or tenement within each tything, manor, or liberty respectively, as shall in the judgment of the said Commissioners be fit and proper for supplying turves for fuel for the use of such cottages or tenements, and which allot-

STIRLING, J. ments shall for ever afterwards be managed, and the turf arising therefrom shall be cut, taken, and used by the occupiers of such cottages or tenements in such quantities, and at such time or times in every year, and in such manner as the said lords of the said manors respectively, and the churchwardens and overseers of the poor acting for or within such manor, or the major part of them, shall from time to time order and appoint, but such turf common shall not be fed or depastured by any cattle or sheep whatsoever; and that it shall and may be lawful for the lords of the said manors for the time being to act in the execution of the trusts hereby reposed in them by their agents or proxies respectively," to be appointed by writing under their hands. The Commissioners were required (sect. 14) to "allot unto and for the Right Honourable *James* Earl of *Malmesbury*, his heirs and assigns, for and in lieu of his and their great and small tithes yearly arising, issuing, and payable out of and from such parts of the waste grounds hereinbefore directed or intended to be divided, allotted, and inclosed, and which by the said Commissioners shall be allotted and awarded to be inclosed by virtue of this Act, such plot or plots, part of the same waste grounds, as in the judgment of the said Commissioners (quantity, quality, and situation considered) shall be equal in value to one eighth part thereof, within the said tythings of" (named) "and *Week* (commonly called the liberty of *West Stour*), and one seventh part of all such other of the said waste grounds within the parish of *Christchurch* as shall be divided, allotted, and inclosed as aforesaid, and which shall remain after the said public and private roads, and ways, and any allotment or allotments to be made for gravel pits, and for sale for the purpose of defraying the expenses, and for the several occupiers of the said cottages and tenements, shall be taken and deducted; and the allotments so to be set out, allotted, and awarded for tythes as aforesaid shall be in full satisfaction and discharge of all great and small tythes whatsoever issuing, arising, and renewing within such parts of the said waste grounds as shall be so divided, allotted, awarded, and inclosed as aforesaid by virtue of this Act."

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Then it was further enacted (clause 15) "that it shall be lawful to and for the said Commissioners, and they are hereby authorized

and required, to set out and allot such plots in quantity of the said waste lands and grounds intended to be divided and allotted, which shall so remain as hereinbefore is mentioned, as in the judgment of the said Commissioners shall be equal in value to one eighteenth part thereof, unto the several lords of the manors within which the said waste grounds are situate, in lieu of and in full compensation for their several rights and interests in and to the soil of the said waste grounds respectively, which within such manors shall be awarded by the said Commissioners to be divided and allotted under and by virtue of this Act;" and by sect. 16 "the said Commissioners shall divide, set out, and allot all such parts of the residue of the said commonable lands and waste grounds intended by this Act to be divided and allotted, as shall in their judgment be fit and proper to be divided, allotted, and inclosed, or to be held in severalty, unto and for the several owners, proprietors, lessees, and customary tenants thereof, and other persons interested therein, in proportion to their several and respective lands, common rights, and all other rights whatsoever, in, over, and upon the same, which said allotments shall be in full bar of and compensation for all rights of the several parties in, over, and upon such of the commonable lands and waste grounds as shall be divided and allotted as aforesaid."

Then it was enacted (sect. 17) "that as to such part or parts of the said waste grounds as shall not in the judgment of the said Commissioners be thought fit and proper to be divided, allotted, and inclosed, or to be held in severalty, they the said Commissioners shall be, and they are hereby authorized and empowered, to order and direct that the same or certain part or parts thereof shall be ring fenced, or continued open and be flocked and depastured in common, in such proportions, manner, and times, or used only for the purpose of cutting fuel and turf in such quantities, and at such time or times in each and every year by such proprietors under such orders, rules and regulations, and in such manner as they the said Commissioners shall think proper."

In 1806 the Commissioners made their award and, *inter alia*, allotted 425 acres of waste for the turf common. The $1\frac{3}{4}$ acres taken by the Commissioners formed part of this. It appeared that the practice of cutting turf had fallen into abeyance, and

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no use had been made of the land, but the lord of the manor had taken steps to vest it in the *Bournemouth* Commissioners for the benefit of the town.

The petition came on to be heard before Mr. Justice *Kay* upon the 6th and 8th of November, 1886, when, after arguments on behalf of the owners of cottages and the *Bournemouth* Commissioners, who, and also the occupiers of cottages, were represented by counsel, his Lordship was of opinion that the *London and South Western Railway Company* and the Attorney-General should be brought before the Court, and directed that the petition should stand over for that purpose. There having been a transfer of the business of the Court to Mr. Justice *Stirling* in November, 1886, and the service of the petition having been, as ordered, made, the petition came on to be heard before his Lordship in December, 1886. It was stated at the bar that the question raised affected rights over some 4000 or 5000 acres of waste lands. On the 10th of December, 1886, there was a meeting of the occupiers of cottages, and they agreed as to the sufficiency of the purchase-money, and to submit to the jurisdiction of the Court.

Robinson, Q.C., and *Reginald Cust*, for the Petitioners, owners of cottages:—

The purchase-money was paid into Court by the lord of the manor in order to get rid of the railway company, who, it may be argued, have not got a good title. The company, however, paid a fair price for the lands taken. The money being in Court there are several claimants. The lord of the manor will ask the Court to say that the turbary common was vested in him by the Act of Parliament to enable certain persons to cut turves, and as that can be no longer done, it reverts to him or belongs to his assignees. But the owners of the cottages, for the occupiers of which the right of common was given, contend that they are entitled to the fund. It is submitted that, upon the true construction of the Act, the lord has no interest in the fund. For his rights he has received compensation by having one-eighteenth allotted to him, and that was in full discharge of them. The most that he can claim will be one-eighteenth in the fund. There

was a benefit given to the owners of the cottages, as they were enabled to obtain a greater rent from the occupiers. The case is similar to houses in a *London* square. The garden in the centre enables the owners to get higher rents. The real benefit of the occupiers' rights—usurped rights more or less acquiesced in—rights obtained by encroachments—to cut turves enured to the owners. The occupiers sustained no loss, and they cannot be regarded as having any claim or right to compensation: *Dean and Chapter of Ely* v. *Warren* (1); *Fox* v. *Amhurst* (2); *Austin* v. *Amhurst* (3). The owners having been damnified by the taking of the common they are entitled to the fund; but if not to the *corpus*, then the fund should be invested and the income paid to the occupiers: but this is not a charity, and before the Act there was no trace of charity. There was not a gift of fuel allotments to the poor, and the *Commons Act*, 1876 (39 & 40 Vict. c. 56, s. 19), which recites that awards made under the authority of *Inclosure Acts* prior to 1845, in reference to fuel allotments, has not, as had been suggested, any application to this case. Some of the occupiers may be poor, but there are some who are tenants of large houses. The case is very different from that of *Attorney-General* v. *Webster* (4), where there was a gift for a parish.

Hastings, Q.C., and *Kenyon Parker*, for the *Bournemouth* Commissioners:—

The occupiers are not entitled to the fund. If they ever had any rights and they have not been extinguished, a very small sum will be the value of them, and the remainder of the fund belongs to the Commissioners. The occupiers are certainly not entitled to the whole of it. The turbary acres were by the Act vested in the lord with a trust for the cutting of turves, but in no sort of way is it a charitable trust. The occupiers were to cut turves only. The other rights of sporting, minerals, and digging gravel remained in the lord. The soil was left in the lord subject to user. The creation of a turf common did not exhaust the lord's rights, nor did the Act take from him rights in the property,

(1) 2 Atk. 189.
(2) Law Rep. 20 Eq. 403.
(3) 7 Ch. D. 689.
(4) Law Rep. 20 Eq. 483.

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which was allotted to a particular purpose only: *Reg.* v. *Inclosure Commissioners for England and Wales* (1). The analogy of a *London* square does not apply. The owners have no rights. If it be a trust they have no title, and if it be so they must predicate that they are occupiers. There could not be a charity of the whole fund, and there would have to be an inquiry as to how much the occupiers are entitled to. The occupation of a cottage is not a test of poverty.

W. Pearson, Q.C., and *Ribton*, for Sir *G. Meyrick*, the lord of the manor:—

By the award under the Act the rights of the owners were absolutely extinguished, but the original rights of the lord in the fee simple were preserved, and, except that he was not to depasture, he could dig gravel, cut timber, get minerals, and sport. The occupiers could only take turves during the time appointed for their own use but not for sale, and as their rights, or pretended rights, were infinitesimal in the small quantity of land taken by the railway company, the whole belonged to the lord as owner of the soil. There was no charity. The cottages were substantial and the occupiers were not in poverty. But it was quite immaterial whether a charity or not. The right was to cut turves, and that was gone, but if not there would have to be an inquiry as to the interests of the lord and the occupiers in the fund, and if any part of the fund belonged to the occupiers; whether it was a charity or not, it would have to be preserved in some way for the benefit probably of existing and future occupiers.

Spencer Butler, for the occupiers of cottages served with the petition, resisted the claims of the lord, his assigns and the owners, and asked that the income of the fund should be paid to the occupiers for fuel or for a purpose *cy-près*, as the Act created a trust in the lord for the benefit of them and their successors. He was an official trustee for the occupiers who had, prior to the Act, a right or pretended right over 4000 or 5000 acres, and in lieu of that they were to have an allotment of a small part in trust. By the

(1) 23 L. T. (N.S.) 778.

Act the lord, the owners, and the tithe owner, were compensated for their rights, and the claims of the lord and the owners were unreasonable. No part of the fund should be given to them. The occupiers did not claim as a charity, but as for something given to them by Parliament subject to restrictions. It was a perpetual trust, but, should it be held to be a charity, that would be in favour of the occupiers. He referred to *Ex parte Newport Marsh Trustees* (1); *Conservators of the River Tone* v. *Ash* (2); *Attorney-General* v. *Webster* (3).

Hemming, Q.C., and *Pauli*, for the railway company:—

The company having paid an additional 5 per cent. to the purchase-money, and having been brought here by order of the Court, not making any claim, ought to have their costs provided for out of the fund. We have no interest in the fund provided all parties assent not to dispute the sale.

Ingle Joyce, for the Attorney-General:—

All the Court has to consider are the provisions of the Act, which created a trust for division of the lands between the owners and occupiers. There was by the award a definite portion allotted to the lord; and to the owners; in full compensation to them for their rights in the lands allotted to the occupiers. The lord was a trustee of the turf common for the occupiers in perpetuity. The class was defined, but not the persons. The decision in *Goodman* v. *Mayor of Saltash* (4) governs this case. It is a charitable trust for all time for those persons, occupiers of ancient tenements in a particular district: *Bristow* v. *Bristow* (5); *Wright* v. *Hobert* (6). If it should be held to be a charitable trust, the value of the lands will have to be properly ascertained, and the company should be ordered to pay the costs or some of them.

Robinson, in reply.

Subsequently Mr. *Butler's* clients were appointed to represent the whole class of cottagers and accepted the sale.

(1) 16 Sim. 346.
(2) 10 B. & C. 349.
(3) Law Rep. 20 Eq. 483.
(4) 7 App. Cas. 633.
(5) 5 Beav. 289.
(6) 9 Mod. 64.

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In pursuance of the Act the Commissioners made an award dated the 24th of September, 1806, and thereby allotted to Sir *George Tapp*, at that time the lord of the manor, in trust for the occupiers for the time being of all such cottages and tenements within the liberty of *West Stour* as were mentioned in a schedule to the award, in lieu of their rights or pretended rights or custom of cutting turves in the said liberty, certain parcels of land of which those purchased by the *London and South Western Railway Company* formed part. The lands so purchased were at the time they were acquired by the railway company still subject to the obligations created by the Act of Parliament and the award of the Commissioners, but apparently the rights created by the Act had fallen into disuse.

It was part of the scheme contemplated by the Act of Parliament that some of the lands to be dealt with by the Commissioners, namely, those allotted for the purpose of the turf common, should remain uninclosed, and that others of the same lands might be permitted by the Commissioners, in the exercise of their discretion, to remain open and uninclosed, and an examination of the language of the Act appears to me to shew that, throughout the Act, a distinction is drawn by the Act between the lands directed or intended to be divided, allotted, or inclosed, and those which should be actually awarded to be divided and allotted. It was contended that the respective claims of the lord of the manor and the owners of the cottages were excluded by the terms of the Act relating to the allotments to be made to them. The allotment to be made to the lord was to consist of such plots and quantities of the lands "intended to be divided and allotted" which should remain after making such allotments as in the Act previously mentioned, including the allotments for the several occupiers of cottages and tenements as should in the judgment of the Commissioners be equal in value to one-eighteenth part thereof, and such allotments were to be in full compensation for his rights and interests in and to the soil of the waste grounds, which should be "awarded to be divided and allotted" under or

by virtue of the Act. The allotments to be made to the owners were to consist of such parts of the residue of the lands "intended to be divided and allotted" as should in the judgment of the Commissioners be fit and proper to be divided and allotted and held in severalty, and were to be in compensation for all the rights of the several parties in, over, and upon such lands as should be "divided and allotted" as aforesaid.

The question then arises whether the allotments for the purpose of the turf common were awarded to be divided and allotted, or were divided and allotted, within the meaning of the Act; and in my judgment they were not. The word "divide" appears to me to be used throughout in the same sense in which it occurs in the preamble in the passage which I have already read: "but if the same"—that is the "commonable lands and waste grounds"—or certain parts thereof were "divided into specific shares and allotted unto and amongst the several owners" and persons interested therein "in severalty." The allotments for the purpose of the turf common were not, as I read the Act, to be divided into specific shares or allotted in severalty, but were to constitute a turf common, and to remain open and be enjoyed by the beneficiaries of the common just as much as the lands which the Commissioners might not consider fit or proper to be divided and allotted, or inclosed, or to be held in severalty. Under these circumstances those allotments did not form part of the waste grounds in respect of which the lord and owners were to receive compensation under the Act.

In my opinion, therefore, the clauses relating to the allotments to be respectively made to the lord and owners do not exclude their claims to be interested in the allotments made for the purpose of the turf common, and their rights appear to me to be governed by the enactments which relate to that common.

Now those enactments provide that the allotments are to be made to the lord in trust for the occupiers of the cottages; but, when the trusts are examined, it is found that they do not require for their execution any interest in the soil, but are entirely consistent with the beneficial interest in the soil remaining vested in the lord. The object of the trust was to secure a supply of turves for fuel for the use of the cottages and tenements. It is

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old law, laid down in *Coke* upon *Littleton* (1), that "if a man grant to another to dig turves on his land and to carry them at his will and pleasure the lands shall not pass, because but part of the profit is given; for trees, mines, &c., shall not pass. Still less will trees, mines, or the soil pass, under a grant to another to dig turves simply for the purpose of use in a particular messuage." From the trusts created by the Act, the lord does not, as far as I can see, derive, directly or indirectly, any benefit; and, if it were to be held that the lord had lost his beneficial interest in the soil, the result would be, if I am correct in the conclusions previously arrived at, that he has been deprived of that interest without any compensation or benefit whatever being given to him. I think that the Act ought to be construed so as to avoid such a result; and, in my opinion, the freehold of the allotment remained in the lord in his original right but became subject to the obligations as to the user of the allotments imposed by the Act. I am fortified in this view by the case of *The Queen* v. *Inclosure Commissioners* (2), in which similar conclusions were arrived at upon the construction of an Act the language of which was, in some respects, less favourable to the lord than the present. It is true, as was pointed out in the argument, that the question before the Court was not the same as that which I have now to decide, being simply whether the freehold was vested in the lord so as to render his consent necessary to an inclosure under sect. 21 of the *General Inclosure Act* of the present reign. The grounds of the decision, however, appear to me to be applicable to the present case. Under that Act, the Commissioners were required (sect. 15) to set out certain specified portions being the least valuable for cultivation of the said commons, &c.; making in the whole 300 acres, in as many different terms as to the Commissioners should appear expedient, and which allotments were to include the private roads necessary to be left for access to the different cottages and houses situate on such commons or waste lands for the use of the occupiers of certain houses or cottages; and the occupiers of such houses or cottages and tenements for the time being were at all times afterwards to have the sole and exclusive right of using the said parts

(1) Page 46. (2) 23 L. T. (N.S.) 778.

of the said commons or heaths so to be set out and allotted for the purpose of pasture and of cutting turf and heath for fuel, in equal proportions, according to the number of the said houses and cottages without paying anything for such use. Then they were also required (sect. 16) to set out and allot to the lord of the manor, his heirs and assigns, one-sixteenth part in value of the residue of the said commons, heath, and marsh and waste lands (other than and except such part of the said common, heath, and waste lands as shall be sold for the purposes of the Act as thereinafter directed) in lieu of all claims, right, title, and interest of the lord of the manor of, in, or to the soil of the commons, heath, and marsh and waste lands. It was laid down by all the Judges, that, under that Act, the soil did not pass away from the lord of the manor. Lord Chief Justice *Cockburn* said (1): "Although the words of the 16th section of the old *Inclosure Act* go to the extinction of the rights of the lord of the manor with respect to the manor generally, yet when we look at the object of the section, it is clear that it could not have been intended that his right to the soil in these 300 acres should be taken away. The lord is to receive a certain allotment in respect of that part of the common which is inclosed. But it was a part of the scheme that, whereas the larger portion of the waste should be inclosed, and in respect of that he should receive an allotment which should be in lieu of his rights, yet, as to 300 acres, they should not be inclosed, and as to these, as the freehold must be in some one, it would be in the lord of the manor. It has been argued that it may have been taken out of him in respect of his original right, and re-vested in him as a trustee. I see, however, nothing to warrant that construction. Whatever may have been the intention of the 16th section, I can find nothing which takes the right of the soil out of the lord of the manor."

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Then Mr. Justice *Blackburn* said: "The 15th section of the old *Inclosure Act* provides for the setting out of 300 acres of the waste lands for the purpose of pasture, and of cutting turf and heath for fuel for the commoners. Then comes the 16th section, which gives the lord of the manor an allotment in lieu of all claims as such lord, and we must look to ascertain whether that allotment is in respect of all the lands in the manor, or in respect

(1) 23 L. T. (N.S.) 781, 782.

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of those only which have been inclosed. Now, upon a fair construction of these sections, I am of opinion that his right to the soil in the 300 acres still remains."

Then Mr. Justice *Hannen* was of the same opinion, and said: "Looking at the sections of the Act I cannot suppose that it was intended that the cottagers should have a right to the soil in these 300 acres, but only a right of pasturage. If so, the right to the soil, unless given to someone else, would remain with the lord of the manor. Now it certainly is not conferred upon any other persons, and that being so, it must still be in the lord of the manor."

I next proceed to consider the claims of the owners and occupiers of the cottages; and, with regard to them, it is to be observed that the persons to benefit under the section are "the occupiers for the time being of all such cottages and tenements containing less than one acre each, as were erected on ancient sites, or as have now been erected for more than fourteen years, in lieu of their rights or pretended rights or custom of cutting turves."

Of the precise nature of such rights or pretended rights or custom, nothing has been disclosed beyond what is to be gathered from the somewhat vague language of the Act of Parliament. I think, however, it may reasonably be inferred, and the case was argued on the footing, that they were ordinary rights of common of turbary, a title to which would be made out by prescription as regards ancient messuages, and by means of the presumption of a lost grant in cases where uninterrupted enjoyment could be proved for a period which is ordinarily fixed at twenty years, but which, in the present case, special circumstances may have induced the Legislature to fix at fourteen years. If this were so, the rights in question would be legally vested in the owners of the cottages or tenements, but, from their nature, being rights of taking turves to be used as fuel in messuages, could only be enjoyed by the actual occupiers. The rights conferred by the Act are stated to be in lieu of those to which I have referred, and are given to the occupiers for the time being without reference to the owners. Nevertheless the owners derive an indirect benefit, for if the rights in question were beneficial, a cottage to which

the right was incident would let at a higher rent and be more valuable to its owner than one not entitled to the benefit of the Act. If, therefore, the occupiers are the persons to take under the Act, still the owners are not left without any benefit: and this being so, I see no ground for holding that the rights or benefits under the section are vested in the owners; but, subject to the question which I have still to discuss, it would seem to me, that, upon the construction of the Act, the rights had been given to the occupiers for the time being, and that the benefit which was derived by the owner was the indirect one which I have pointed out.

It was, however, contended on behalf of the Attorney-General that the section created a charitable trust, and the case of *Goodman* v. *Mayor of Saltash* (1) was cited to support that contention. There a municipal corporation and their lessees had from time immemorial exercised the right of dredging for oysters in a navigable tidal river, and the user was such as to establish their right to a several fishery in the river. At the same time the free inhabitants of ancient tenements in the borough had also from time immemorial exercised the privilege of dredging for oysters in the same river between the 2nd of February and Easter Eve in each year; and the question was, whether a legal origin for this usage could be presumed. No such origin could be found in prescription. Lord *Selborne* said (2): "If it were necessary that the class to which the appellants belong should make out a right to a profit *à prendre in alieno solo*, I should be of opinion that they could not do so. *Gateward's Case* (3) is a conclusive authority against such a claim by such a class unless made through a corporation under its corporate title, as it was in the *Coventry Case* (*Boteler* v. *Bristow*, (4) and in *White* v. *Coleman* (5). Here there is no corporation through which the claim could be made, except the mayor and free burgesses of *Saltash* themselves; and the right could not possibly be prescribed for through them, or under their title, as a profit *à prendre in alieno solo*, because, if a several fishery exists, they are the owners in fee simple of that fishery."

(1) 7 App. Cas. 633.
(2) Ibid. 641.
(3) 6 Rep. 59 b.
(4) Year Book, 15 Edw. 4, 29 b, 32 b.
(5) Freem. 135; 3 Keb. 247.

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It was, however, held that it might, and ought to, be presumed that the fishery was originally granted to the corporation subject to a condition or proviso that the free inhabitants of ancient messuages within the borough should be entitled to fish within the fishery in accordance with the usage found in the case, and that such a grant would be valid as containing all the elements necessary to constitute a charitable trust. Lord *Selborne* said (1): "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust;" and his Lordship in a subsequent part of his judgment went on to shew that the probability was that the free inhabitants of ancient messuages, although in modern times neither burgesses nor freemen of the borough, yet in ancient times did stand in some definite relation to the body corporate, and possibly were originally burgesses of the borough. Earl *Cairns* agreed in that conclusion, both as regarded the question of law and that of fact. As to the question of law involved, his Lordship said (2): "Such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say, a public trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet, if it creates a charitable, that is to say, a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities."

I am, of course, bound by, and I fully accept all that was laid down in the case cited. I am, nevertheless, unable to regard it as an authority for the proposition that, wherever benefits are conferred on the occupiers of a class of houses, a charitable trust is necessarily created. Had Lord *Selborne* and Lord *Cairns* intended to lay this down, even as regards an ordinary grant, they would hardly have considered it necessary to inquire so minutely as they did into the relation of the free inhabitants of ancient messuages to the body corporate; still less, I think, can

(1) 7 App. Cas. 642, 644. (2) 7 App. Cas. 650.

such a proposition hold as regards rights conferred by an Act of Parliament, where no difficulty can arise from the rule against perpetuities. In each case, it seems to me, the whole surrounding circumstances should be considered, and it is to be determined whether, to use the language of Lord *Cairns*, there is really a trust for the benefit of private individuals or a fluctuating body of private individuals, or whether a public interest is created.

So dealing with the case before me, I think it material to observe that the rights conferred by the Act are expressly given in lieu of certain pre-existing rights or custom of cutting turves. If the legal origin of such pre-existing rights or custom be inquired into, it would seem to me that, in the present case, no difficulty would occur. The rights in question are, as I have already pointed out, among those ordinarily acquired by private individuals from prescription or grant. They are not of a public but of a private nature; and it seems to me that, unless there is something in the Act of Parliament to shew the contrary intention, the rights substituted for them by the Act must also be deemed to be private ones. I can find nothing in the Act to satisfy me that a public interest was intended to be created. The only circumstance which tends in that direction is that the churchwardens and overseers of the poor, in conjunction with the lord of the manor, were to regulate the enjoyment of the rights. But I do not think that that is sufficient; and consequently I am of opinion that the contention put forward on behalf of the Attorney-General fails.

I am, therefore, of opinion that the persons legally interested in the lands at the time when they were taken by the railway company were the lord of the manor and the persons claiming under him, and the occupiers of the cottages; that the owners of the cottages had only the indirect interest I have already mentioned, namely, that accruing to them from the greater value of the cottages whose occupiers were entitled to the benefit of these rights; and that the rights of the occupiers are in the nature of a perpetuity specially created by the Legislature, and are not charitable.

The fund in Court ought to be divided in accordance with these rights and interests, and, as nearly as may be, in like

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manner as if the procedure prescribed by sects. 90 to 107 of the *Lands Clauses Consolidation Act*, 1845, had been followed. The order will be prefaced by a declaration or expression of opinion that the lands in question formed part of the turf common directed to be formed for supplying turves for fuel for the use of the cottages or tenements mentioned in the award made in pursuance of the Act; and that the soil of the lands was vested in the lord of the manor, but without any right on his part to feed or depasture any sheep or cattle on the lands. Then there must be inquiries what compensation is payable in respect of the right to the soil in the lands; and secondly, what compensation is payable in respect of the commonable rights of the occupiers of the cottages or tenements over the lands.

After payment of the costs of all parties other than the railway company out of the fund in Court, the balance will be apportioned in the ratio of the amounts of compensation so ascertained. As to the payment out, probably there will be some further direction necessary, and it will be best to reserve liberty to apply.

Solicitors: *Nicholl, Manisty, & Co.*; *Crawley, Arnold, & Co.*; *Mann*; *Burchells & Co.*; *Hare & Co.*; *Lovell, Son, & Pitfield.*

T. F. M.

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[1886 C. 529.]

Testator's Business—Trust Chattels—Sale by Trustee to co-Trustee—Unregistered Bill of Sale—Bankruptcy of Purchaser—Following Trust Assets—Bills of Sale Act, 1878, *ss.* 4, 8 [*Revised Ed. Statutes, vol. xviii., pp.* 652, 654].

A testator, who died in 1867, bequeathed all his property to his wife and two other persons upon certain trusts, and appointed them his executors, and empowered them to carry on his business of a wine merchant, with a direction that, on his youngest son attaining twenty-one, his sons should successively have the option of purchasing the business upon certain terms. The widow alone proved the will, and carried on the business until 1873, when a suit was instituted to administer the estate, and the business was continued under the direction of the Court. In December, 1880, the widow died, having by her will appointed *J.* (a son of the testator) and one *C.* her executors, who were then made Defendants to the administration action.

In March, 1880, the youngest son attained twenty-one, and shortly afterwards *J.* (the other sons not desiring to purchase) offered to purchase the business as from the 30th of November, 1880, for £10,329 18*s*. The offer was accepted and sanctioned by the Court, and the arrangement was embodied in an agreement dated the 15th of September, 1882, which provided for the payment of the purchase-money with interest at a future time, and contained a declaration that *J.* and *C.*, or other the trustees of the will of the testator, should have a lien or charge upon the business and effects agreed to be sold for the purchase-money and interest, and that if default should be made in payment of the purchase-money and interest at the time appointed, or if *J.* should become bankrupt, then the same might be recovered by the said trustees by action at law. From the date of this agreement *J.* carried on the business as his own until October, 1885, when he was adjudicated a bankrupt.

At this time the purchase-money was unpaid, and there still remained in specie certain wines and office furniture, which formed part of the testator's estate, and which were sold by arrangement with the trustee in bankruptcy for £632 18*s*. *C.* claimed this sum as representing trust chattels which he was entitled to follow :—

Held, that under the agreement the property in the chattels passed to *J.*; that the clause in the agreement conferring a lien or charge for the purchase-money operated as a bill of sale within ss. 4, 8, of the *Bills of Sale Act*, 1878, and, not having been registered, was void as against *J.*'s trustee in bankruptcy; and therefore that *C.* was not entitled to the money.

JOSEPH ABRAHAM, a wine merchant at *Bristol*, died on the 30th of January, 1867, having by his will appointed his wife

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Jane Abraham, and two other persons, his executors and trustees, to whom he devised and bequeathed his real and personal estate upon trust for his wife for life, and after her death upon certain trusts for his children; and the testator empowered his trustees to carry on his said business of a wine merchant until the youngest of his four sons should attain the age of twenty-one years; and, when the youngest of his said sons should have attained the age of twenty-one years, the testator empowered his said sons or any of them (giving each of them successively an option) to purchase the goodwill, stock-in-trade, and effects of his said business, on certain terms and conditions.

Jane Abraham alone proved the will, and carried on the testator's business until July, 1873, when a suit of *David* v. *Abraham* was instituted to administer the testator's estate, *John Abraham*, a son of the testator, being appointed receiver and manager of the business. The usual administration decree was made in July, 1874, and the business was continued under the direction of the Court.

On the 10th of December, 1880, *Jane Abraham* died, having by her will dated the 5th of January, 1880, appointed *Isaac Coburn* and the said *John Abraham* her executors, both of whom proved her will, and who were then by the usual order of revivor made parties to the administration suit. New trustees of the will of *Joseph Abraham* were not appointed, the executors of *Jane Abraham* acting in that capacity.

On the 19th of March, 1880, the youngest son of the testator attained his age of twenty-one, and shortly afterwards *John Abraham*, the other sons of the testator not desiring to purchase, carried in proposals to purchase the testator's business as from the 30th of November, 1880, which with some modifications were ultimately accepted, subject to the sanction of the Court. The purchase was carried into effect by an agreement dated the 15th of September, 1882, and made between *Isaac Coburn* of the first part, the said *John Abraham* of the second part, *H. H. Abraham* (a son of the testator) of the third part, and *A. G. Abraham* (another son of the testator) of the fourth part, whereby, after reciting (*inter alia*) the will and codicils of the testator, *Joseph Abraham*, his death and probate of his will, the institution of the

suit of *David* v. *Abraham*, and the decree made therein, the death of *Jane Abraham*, the proof of her will, the fact that her executors had been made parties to the administration action, and that *John Abraham* had proposed to purchase the business, which had been valued at £10,329 18*s.*, and that the agreement had been approved by the judge, it was witnessed that *Isaac Coburn* and the said *John Abraham* agreed with each other as follows:—

"1. In consideration of the payments to be made by the said *John Abraham* as hereinafter mentioned the said *Isaac Coburn* agrees to sell and assign to the said *John Abraham* all that the trade or business of a wine and spirit merchant which since the death of the said testator has been and is now being carried on upon certain premises in the city of *Bristol*, and the goodwill thereof, as a going concern, and also all the stock-in-trade, utensils, plant, implements, office furniture, and effects now in and upon the said business premises, and also the book-debts of the said business, for the sum of £10,329 18*s.*

"2. And in consideration of the premises the said *John Abraham* agrees to purchase the said business, goodwill, stock-in-trade, office furniture, effects, and book-debts, for the said sum of £10,329 18*s.*, and to pay for the same, with interest thereon, from the 30th of November, 1880, on the first distribution of the estate of the said testator" in manner therein mentioned.

"3. The said *John Abraham* shall pay all the outstanding debts and liabilities due and owing by the said business on the 30th of November, 1880 . . . . and it is hereby agreed and declared that the said *Isaac Coburn* and *John Abraham*, as such trustees as aforesaid, or other the trustees for the time being of the said will of the said testator, shall have and be entitled to a lien or charge upon the said business and effects hereby agreed to be sold for the said sum of £10,329 18*s.*, or for so much thereof as shall be from time to time remaining unpaid, and for the interest to accrue due thereon . . . . and that if default shall be made in payment of the said sum of £10,329 18*s.* and the said interest at the time hereinbefore appointed for payment thereof respectively . . . . or if the said *John Abraham* shall become bankrupt . . . . the whole of the said sum of £10,329 18*s.*, or the balance thereof which shall then remain unpaid, and the interest then due and

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owing thereon, shall become and be due and payable, and may be recovered by the trustees for the time being of the said will of the said testator, *Joseph Abraham*, by action in any of the Divisions of Her Majesty's High Court of Justice."

On the 13th of April, 1883, *John Abraham* was discharged from being receiver in the administration suit.

After the examination of the agreement of the 15th of September, 1882, *Isaac Coburn* took no further interest in the testator's business, which *John Abraham* thenceforth carried on for his own benefit until the 1st of October, 1885, when he was adjudicated bankrupt, and one *Collins* was appointed the trustee in his bankruptcy. At this time the purchase-money was unpaid, no distribution of the testator's estate having been made.

At the date of the bankruptcy some chattels of the testator's business still remained in specie, and the question arose as to who was entitled to them. These chattels, consisting of certain wines and office furniture, were by arrangement sold for £632 18*s.* 4*d.*, and *Isaac Coburn* then, by leave of the Court, commenced this action against *Collins* to establish his right, as trustee of the testator's estate, to this sum, on the ground that it represented trust assets which he was entitled to follow.

Barber, Q.C., and *H. Reed*, for the Plaintiff:—

The question is, what is the true effect of the agreement of the 15th of September, 1882. At the date of that agreement these chattels were trust property, and, so far as they remained in specie, never ceased to be such. The clear intention of the parties was to protect the trust estate. The sale to the bankrupt did not put an end to the trust, and there is nothing in the agreement which relieves him from his position of trustee so long as the contract remained unperformed. The Plaintiff therefore is entitled to follow these trust chattels: *Pennell* v. *Deffell* (1); *Great Eastern Railway Company* v. *Turner* (2); *In re Hallett's Estate* (3). The doctrine of reputed ownership does not apply here, because the reputed owner was himself the true owner conjointly with his co-trustee.

(1) 4 D. M. & G. 372. (2) Law Rep. 8 Ch. 149, 153.
(3) 13 Ch. D. 696.

[KEKEWICH, J.:—Is not the real question this, whether or not the trustee, on the true construction of the contract, parted with the property in the chattels?]

That is the point, no doubt. We say that until the contract was carried to completion, the intention was that the trust charge or lien should continue. The share of the bankrupt in the trust estate is not sufficient to pay the purchase-money under the contract by some £2000, and under the circumstances the trustee in bankruptcy cannot have a better title under the contract than the bankrupt.

Warmington, Q.C., and *Sidney Woolf*, for the trustee in bankruptcy:—

John Abraham was not a trustee of the original testator. *Jane Abraham* was sole trustee of that estate, and *John Abraham* only comes in as her executor. Therefore, this is not a sale of a trust estate to a trustee *simpliciter*, but a sale of a trust estate to a person desiring to purchase, which the Court permitted. Under this agreement *John Abraham* acquired an absolute power of disposition over the property of the testator, and remained ostensibly the absolute and sole owner until his bankruptcy. The agreement shews that the property was intended to pass, because, if it was to remain trust estate, the lien or charge was not required. The true effect of the agreement is, first a sale by the trustees, and then a regrant by way of charge or lien to give the vendors a security for the purchase-money. If that be so, then this document was an assurance of personal chattels and operated to confer a lien or charge within the meaning of sect. 4 of the *Bills of Sale Act*, 1878, and not being registered is void against the trustee in bankruptcy under sect. 8 of that Act. Secondly, at the time of the bankruptcy all these chattels were in the apparent possession of *John Abraham*. And, thirdly, the chattels were in the order and disposition of *John Abraham* with the consent of the true owner: *Ex parte Dale* (1).

Barber, in reply [was requested by Court to confine himself to the question arising on the *Bills of Sale Act*]:—

This document is not within the *Bills of Sale Act* at all. It is

(1) Buck. 365.

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not a regrant. The real nature of the transaction was a sale by trustees to one of themselves with an overriding lien or charge in favour of the trust as one of the terms of the contract. It was a right connected with the vendor's lien, and the Court could have at any time intervened before and until the whole purchase-money was paid: *Ex parte Watson* (1). It was really unnecessary to insert the charge, but it was put in to indicate clearly the rights of the vendors. As to sect. 8 of the Act, it only applies to the case of a sole grantor, here there was no property in sole possession of the grantor after the execution of the agreement.

KEKEWICH, J.:—

This case raises interesting questions of law, and all the more so, because it is of common occurrence for the Court to be asked to sanction agreements for sale by executors or trustees to one of themselves, or to one of their *cestuis que trust*, not being one of themselves. It frequently happens in an administration action where the party purchasing is entitled to a considerable share of the property being administered, and it is often a matter of consideration whether it will be sufficient protection to the estate generally to take the purchasing party's share in the property in satisfaction of or as a security for the property sold. It therefore is a matter of some little importance, beyond the case in hand, to consider what is the meaning of an agreement like this of the 15th of September, 1882, and what is the position of the parties under such an agreement.

It seems that *Joseph Abraham*—who was a wine merchant at *Bristol*, and had amassed a considerable property—made a will by which he gave his property to three persons whom he appointed executors. One of those was his widow, and she alone proved the will and accepted the trusts. By that will he gave all his business and the chattels and effects connected with it to the trustees, with a direction that on a certain event happening (it is immaterial to specify it more particularly) his sons were to be at liberty to purchase the business and the chattels and effects connected with it. The purchase-money was to be ascertained by a valuation in the manner pointed out in the will, and the trustees,

(1) 5 Ch. D. 35, 44.

beyond being empowered and directed to sell to the sons, were allowed by the will to accept the bond or bonds of such son or sons purchasing that business to secure payment of the amount of such valuation or any part thereof by instalments. So that the will clearly contemplated a sale, at the time mentioned, by the trustees of the will to the sons there referred to, or any of them, as the case might be, as an out and out sale, and without the payment of a single penny down, and also contemplated that it might be desirable that the purchasers should be let into possession and take the business out of his estate on executing bonds for payment of the purchase-money by instalments. No doubt in that event the trust estate would have had the benefit of a charge on the purchasing son's share in the estate, because the will contemplated a sale before the division and distribution of the estate. Now what happened was this. A suit was instituted against *Jane Abraham* for the administration of the estate, and, on her death, her two executors (one of whom is the Plaintiff *Coburn*, and the other *John Abraham*) were made parties to that suit as defendants, and the suit was thenceforth carried on as against them. There was a judgment in the suit, there was a manager of the business appointed, there was a receiver, and I take it that the ordinary accounts were directed and prosecuted in Chambers. That being so, *John Abraham*, one of the executors of *Jane*, and in that character one of the legal personal representatives of the original testator, and also (though no trustees were actually appointed) one of the trustees of the original testator's estate, happened to be one of the sons of the original testator, and therefore he was a party to the suit, and a party to all the proceedings, in a different character from that of an executor of *Jane Abraham*, and through her of *Joseph Abraham*. He was also the person appointed manager, so that he filled several characters. Now in 1881 he contemplated buying the business, and the matter was considered by the Court necessarily, because, under those circumstances, there was no power of selling it out of Court. The matter was considered by the Court, and ultimately this agreement was entered into, and settled and executed under the sanction of the Court. It recites that he was desirous of purchasing this business, and that none of the other sons were.

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Therefore he had a right under the will to come in and purchase the business, and it was intended that it should be done upon the terms or conditions mentioned in the will. That was the contemplation of the parties. Though those terms and conditions were departed from to some extent, still (perhaps as Mr. *Barber* says, rather by way of imposing other conditions than making any concession) the idea was to carry out the intention of the testator; and the intention of the testator, as I have already mentioned, was to allow the son or sons purchasing the business to become the absolute purchasers and owners for their own benefit. Then those terms having been discussed and having been embodied in this agreement, we have in the first clause an agreement that in consideration of the payments to be made by *John Abraham*, *Isaac Coburn*, his co-executor and co-trustee, agreed to sell and assign to him all the business and the goodwill thereof, and all the stock-in-trade and book debts,—putting him, in fact, in possession of the whole business of a wine merchant, which had been carried on by the testator and by the trustees under his will up to that time. Then there are provisions for the payment of the purchase-money, which was not to be paid at all until the distribution of the estate. That was fair and reasonable if the Court was satisfied (as I suppose it was) that *John Abraham's* share of the estate would be sufficient to pay the whole of the purchase-money, there being no interest payable on the purchase-money until the distribution of the estate; but ultimately it was not thought sufficient to charge that on *John Abraham's* share alone, so two of his brothers came in, and their shares are charged to the extent of £3000, those shares not being liable to any interest. All that was to be done by means of retainer out of their shares in the estate, and so the Court was satisfied that the estate would be secured. *John Abraham* in taking over the business was also to pay all the debts then outstanding, and he was to indemnify the testator's estate which otherwise would have been liable, not only to the debts contracted during the testator's lifetime, but also to all the debts contracted in that period during which the trustees were managing it under the will. Down to that point I see nothing at all but an ordinary agreement, having regard to the circumstances of

the case, carrying out the terms of the will so far as they were applicable to the sale of this property to *John Abraham* for a sum not to be paid down, but sufficiently secure, or supposed to be sufficiently secure, and to be paid at a future time with the intention that *John Abraham* should thenceforth be the absolute owner of this business and carry it on for his own benefit. I think if the agreement had stopped there, there could hardly be any question that that was the intention. But then some further security seems to have been required, and a security of a special character. It is, no doubt, a security in the nature of a vendor's lien, but it is not a vendor's lien in the sense in which we usually employ the term—as a vendor's lien existing by force of law. It is a vendor's lien created in express terms with reference to this particular property, which was a property to which the familiar vendor's lien, enforcible against land, would not apply. There is an express stipulation that *Henry Isaac Coburn*, the Plaintiff, who was one of the trustees and who was not interested in the purchase, and *John Abraham*, the other trustee who was interested in the purchase, and was in fact the purchaser, should have a lien or charge upon the said business and effects which were agreed to be sold for the whole purchase-money and interest, subject to certain prior charges in favour of other persons. Then it is further provided that if default should be made in payment of those sums after notice, or in the case of bankruptcy, then the whole sum should become due and the trustees might recover it against *John Abraham*.

Now the question to my mind is, what is the meaning of that clause? If it is to be construed as in any way incorporated into the whole agreement, and to be read as a sort of modification of the absolute sale, then there would be much force in the argument that there was a trust estate not intended to be parted with, that is, parted with out and out, and the trustees, now represented by the Plaintiff, might intervene and take whatever they could find remaining in specie of the trust property, and apply it to the satisfaction of the debt due to the estate. That it was intended to give them a lien which would prevent *John Abraham* making away with the property so as to defeat the security, so as to enable him to convert the whole property to his own benefit in

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an improper way, that is to say, otherwise than in the ordinary course of business, I think is reasonably clear; but was it intended in any way to modify the otherwise absolute sale out and out of the business and effects? I think the meaning is, as suggested by Mr. *Woolf*, that it should be a superadded charge as if inserted in another document. There was not the slightest reason to insert it in another document, nor would that have made the slightest difference; but that is a good way of looking at it. This seems to me to be an independent charge. I think the proper construction of the agreement read as a whole (and I think it must be read as a whole) is that there was an absolute out and out sale to *John Abraham* of the whole property, and that then, by an independent clause, *John Abraham* charges what is due from him, the purchase-money and interest, on the thing purchased, so as to give the trustees, the vendors, including himself, some security for the purchase-money over and above that which is contained in the earlier part of the agreement. If that be, as I hold it to be, the proper meaning and effect of this clause, it cannot be enforced in the circumstances which have happened, that is to say, *John Abraham's* bankruptcy, by reason of its being a bill of sale within the *Bills of Sale Act*, 1878, which was the Act in force at that time, and which is applicable to the agreement. Sect. 4 of that Act defines a bill of sale and includes "other assurances of personal chattels," which words would, I think, cover this agreement; but I think that the words which really touch it are these: "Any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." It seems to me that this third clause does give the trustees, and was intended to give the trustees, a right in equity, and a charge or security on these particular chattels for the purpose of securing their debt. Therefore it seems to me to come directly and without doubt within the meaning of the 4th section; and if it is also within the 8th section, then it is void as against the trustee in bankruptcy and of *John Abraham*. But it is suggested that it does not come within the 8th section, because there is no person who could make the bill of sale within that clause. One would be

very reluctant to think that the Legislature had made such a slip as to include a bill of sale in the 4th section and then not to include it in the 8th; but to my mind, there is no foundation for that argument. This clause must operate by way of reservation, but what is the nature of the reservation? It is the reservation of a right to *Coburn* and *Abraham* as against *Abraham*. In other words it is a grant by *Abraham*, one of the parties, to *Coburn* and himself. Why he should not make such a grant within the meaning of the 8th clause—why he should not execute a bill of sale of that kind, so that it might be registered under the Act, and be void unless registered, I do not understand. It seems to me that *John Abraham* might have made such a deed, and that this is an agreement to make such a deed, and being an agreement to make such a deed, it comes within the 4th section, and therefore within the 8th section; and I think that is fatal to the Plaintiff's claim. That being so, it is not necessary to go into the second defence raised as to reputed ownership, because I think *John Abraham* was himself, in that view, the absolute owner, and that therefore the doctrine of reputed ownership could not apply. To my mind the Plaintiff's case fails on the ground I have mentioned.

Solicitors: *Coburn & Young; Maples, Teasdale & Co.*

H. L. F.

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March 15.

SOPER *v.* ARNOLD.

[1886 S. 3056.]

Vendor and Purchaser—Contract abandoned by Purchaser—Forfeiture of Deposit—Defect in Title subsequently discovered—Action to recover Deposit—Delay.

The conditions in a contract for the sale of land provided, amongst other things, that the purchaser should pay a deposit on the purchase-money, and that if he should fail to comply with the conditions his deposit money should be forfeited to the vendors, who should be at liberty to re-sell the property. The purchaser paid the deposit, investigated and accepted the title, but when the time came for completion, being unable to find the balance of the purchase-money, he abandoned the contract. The vendors consequently rescinded the contract and forfeited the deposit. Three years after the purchaser heard that on a re-sale by the vendors under the same conditions an objection had been taken to the title which had been held fatal, and thereupon brought an action to recover his deposit on the ground that there had been a mutual mistake and a total failure of consideration in his contract:—

Held, following *Howe* v. *Smith* (1), that he was not entitled to recover his deposit.

Semble, that he was also precluded from relief by his laches.

Want v. *Stallibrass* (2) distinguished.

By a written contract dated the 4th of November, 1882, and made between the Defendants *Arnold* and *Patten* of the one part, and the Plaintiff *Soper* of the other part, the Defendants agreed to sell the Plaintiff a freehold property at the price of £6100, the sum of £610, part thereof, to be paid on the signing of the contract, and the residue to be paid on the 1st of February, 1883, on which day the sale was to be completed. The material conditions of sale were as follows:—

"6. All objections and requisitions (if any) in respect of the title or abstract or anything appearing therein respectively shall be stated in writing and sent to the vendors' solicitors within seven days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered waived, and in this respect time shall be deemed of the essence of the contract. . . . Lastly. If the purchaser shall fail to com-

(1) 27 Ch. D. 89. (2) Law Rep. 8 Ex. 175.

ply with these conditions his deposit money shall be forfeited to the vendors who shall be at liberty to proceed to another sale either by public auction or private contract with or without notice to the purchaser at the present sale, and the deficiency (if any) occasioned by such second sale, together with all charges attending the same, shall immediately after such sale be made good by the defaulter at this present sale, and in case of non-payment of the same the whole shall be recoverable as and for liquidated damages, and it shall not be necessary for the vendors to tender a conveyance."

The Defendants were trustees for sale under the will of one *B. A. Arnold*, deceased, who had purchased the property in 1874 from the trustees of the will of one *H. A. Hoare*, deceased.

On the signing of the contract the Plaintiff paid the deposit of £610. The Defendants duly delivered to the Plaintiff an abstract of their title, and the Plaintiff's then solicitor investigated and accepted the title and prepared the draft conveyance, which was approved by the Defendants; but when the time came for completion, the Plaintiff, being unable to find the residue of the purchase-money, did not complete. On the 13th of March, 1883, the Defendants served the Plaintiff with a written notice requiring him to complete the contract within fourteen days, and stating that if he did not do so, they would, under the last condition of sale, rescind the contract and forfeit the deposit. The Plaintiff did not complete, and, accordingly, the Defendants on the 27th of March, 1883, by notice in writing, rescinded the contract and forfeited the deposit.

In June, 1885, the Defendants again sold the property under the same conditions for less money to one *F. Slocombe*, who took an objection to the title on the ground that the trustees of the will of *H. A. Hoare* had not duly exercised their power of sale. This objection came before *Chitty*, J., on the 28th of January, 1886, on a summons under the *Vendor and Purchaser Act*, 1874, when his Lordship held the objection well founded, and that a good title could not be made to the property. On this decision coming to the knowledge of the Plaintiff he at once applied to the Defendants to return him his deposit of £610, and, on their refusal, commenced this action, alleging that the contract of the

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4th of November, 1882, was entered into under a mutual mistake of fact, and that, the Defendants having no title to the property, there had been a total failure of consideration for the contract, and claiming repayment of the deposit with interest. The Defendants in their defence traversed the allegations in the statement of claim, and pleaded that under the circumstances the contract had been validly rescinded and the deposit duly forfeited, and the Plaintiff was precluded from recovering the deposit by his laches and acquiescence.

Issue was joined, and this was the trial of the action.

Warmington, Q.C., and *J. M. Rigg*, for the Plaintiff:—

In this case there was a total failure of consideration. The whole basis on which the contract proceeds is a representation that the vendors have the power and are in a position to make a good title. *Want* v. *Stallibrass* (1) is directly in point. There was also a common mistake as to the vendors' title, and a purchaser will not be compelled to complete in such a case: *Cooper* v. *Phibbs* (2); *Jones* v. *Clifford* (3). There is no case in which a party has been entitled to forfeit and retain the deposit unless at the time he was in a position to complete the contract. Here the Defendants never were in that position. They had no title.

Barber, Q.C., and *Vernon Smith*, for Defendants:—

There is no ground for claiming back this deposit. It was paid as an earnest or guarantee for the completion of the contract, and it was through the Plaintiff's default that the contract went off: *Howe* v. *Smith* (4); *Ex parte Barrell* (5). There is a marked distinction between *Want* v. *Stallibrass* and this case. There the objection to the title was taken whilst the contract was still *in fieri*. Here, the purchaser accepts the title and then abandons the contract. He has therefore forfeited his right to the return of his deposit.

Warmington, in reply.

(1) Law Rep. 8 Ex. 175.
(2) Ibid. 2 H. L. 149.
(3) 3 Ch. D. 779.
(4) 27 Ch. D. 89.
(5) Law Rep. 10 Ch. 512

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In this case the last condition of sale provides: "If the purchaser shall fail to comply with these conditions his deposit money shall be forfeited to the vendors who shall be at liberty to proceed to another sale," and so on. It is therefore immaterial to consider what the law would be in the absence of that condition.

Mr. *Warmington* says: "Because the Defendants are not in a position to complete, therefore I am here to-day." In one sense that is perfectly true. He is here to-day, because on a re-sale the Defendants have found out that they have a bad title and the Plaintiff has also found that out, and therefore in that sense it is the reason why he comes here. In one sense it is the *causa causans*, because he certainly would not have come here if he had not discovered that fact. But is that the real ground of his action? Is not the real ground of his action this?—that as a matter of fact he has not had and is not going to have the estate; and if he has not had and is not going to have the estate, is it not because he some years ago was unable to find the residue of the purchase-money, and in consequence of that the agreement was rescinded—in other words, because he abandoned the contract into which he entered. The case has been argued on several grounds, and, among others, on this ground, that the case of *Want* v. *Stallibrass* (1) is decisive in the Plaintiff's favour. It has been said, and with considerable force, that there is no case in which a plaintiff has been held deprived of his right to recover a deposit unless it has been shewn that there was a power in the defendants, or those who were claiming the deposit, to fulfil the contract. In *Want* v. *Stallibrass* the circumstances were somewhat peculiar. There was an objection taken to the title, and that objection was treated by the vendors as too late. But at the same time they argued that it was unsound, and, though the correspondence is not set out in the case, it is clear that until December, 1865, the contract having been entered into in September 1865, there was some correspondence which one may assume related to this objection and was an attempt by the vendor to persuade the purchaser that a good title could be given. There

(1) Law Rep. 8 Ex. 175.

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does not appear to have been any rescission or anything done, except that neither side cared to move against the other. Under those circumstances it is more than probable that if either party had filed a bill for specific performance, quite apart from the question of title, that bill would have been dismissed; and at any rate as it appeared the vendor did not make a title, he could not have moved. To my mind that is the distinction of the case of *Want* v. *Stallibrass* (1), and I take it that *Want* v. *Stallibrass* was perfectly well decided on that ground, and is consistent with *Howe* v. *Smith* (2). The case is put by Baron *Pollock* in this way (3): "Where personal property is sold, it is not usual to add any condition of sale respecting the title of the vendor; and in the absence of any express stipulation, if the vendor cannot perform his part of the contract, the same ground that entitles the vendee to resist payment of the whole price entitles him also to recover back any deposit he may have made in part payment thereof, on the ground that there has been a total failure of consideration." Now the question is, can you say that there has been a total failure of consideration when you have never come to that state of circumstances in which you are to determine whether there was a total failure of consideration or not. If in that case the Court could have held that the purchaser had repudiated his contract, and, before he found out or before it was settled that there was a bad title, had thrown it up, the learned Baron would not have used those words "on the ground that there has been a total failure of consideration." In this case I have quite a different set of facts. It is stated in the plainest manner in the statement of claim, not only that there was an abstract delivered, not only that the Plaintiff's solicitor approved the title, but that "when the time arrived for completion of the sale the Plaintiff was unable to find the residue of the purchase-money of £6100, and in consequence thereof the Defendants rescinded the agreement and forfeited the deposit of £610." That being so, the short question is, Is the Plaintiff now entitled to recover this money because when the time arrived for completion he abandoned the contract, threw it up, and in fact said, "Because I

(1) Law Rep. 8 Ex. 175. (2) 27 Ch. D. 89.
(3) Law Rep. 8 Ex. 183.

cannot I will not perform the contract." I do not propose to decide this question on the ground of delay. The test of delay is stated by Lord Justice *Cotton* in *Howe* v. *Smith* (1): "In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract." I might very well hold that here the conduct of the Plaintiff did amount to a repudiation on his part of the contract, and decide against him on that ground. But I do not wish to make that the main ground of my decision. I prefer to give a different reason, well expressed by Lord Justice *Bowen* in *Howe* v. *Smith*, and also supported by the judgments both of Lord Justice *Cotton* and Lord Justice *Fry*. Lord Justice *Bowen* says this (2): "In what sense is it"—that is, the deposit—"a security for the completion of the purchase? It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong." Lord Justice *Fry*, after giving the history of the meaning of deposits, says (3): "It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract." And that seems to me, though it is not precisely on the same lines as the *dictum* of Lord Justice *Bowen*, to be consistent with it and to proceed on the same principle. To my mind it would be wrong to allow the Plaintiff now, because he has found out that the Defendants cannot make a title, to come forward and say: "True it is that when I thought that you could make a title, when I was ready to accept that title, and to have the estate conveyed to me on such title as you could give me, which I believed to be a good one, but which now I know was not in fact a good one—true it is that then, if I had had the money in my pocket, I should have been very glad to have fulfilled my obligations to you, but not having been able to do it and having lain quiet all this time, now, that I find you cannot

(1) 27 Ch. D. 95. (2) 27 Ch. D. 98.
(3) 27 Ch. D. 101.

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make a title, I say that money has always been mine, it never has been yours, the *Statute of Limitations* does not apply, and I ask you to pay me back that which belongs to me." I think to enable a purchaser to say that would be to enable him to do the very thing that Lord Justice *Bowen* said he ought not to be allowed to do, namely, take advantage of his own wrong—I mean wrong, not in the moral sense, but in the sense that he could not perform his contract. I think the vendors are entitled to consider this deposit as paid not only as an earnest, not merely as a security for the completion of the purchase, but also, as Lord Justice *Fry* says, as something which "creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract." I think on that ground, apart from anything else, the Plaintiff's case fails and there must be judgment for the Defendants with costs.

Solicitor for Plaintiff: *Granville Smith*, agent for *T. W. B. Hutchings, Teignmouth.*

Solicitors for Defendants: *Lovell, Son, & Pitfield.*

H. L. F.

KEKEWICH, J. 1887 *Jan.* 15, 17.

ROYAL BRISTOL PERMANENT BUILDING SOCIETY *v.* BOMASH.

[1885 R. 2623.]

Vendor and Purchaser—Delay—Possession—Damages—Loss of Tenant—Compensation—Vacant Property—Deterioration.

Two houses, stated in the particulars to have been "recently in the possession of *F.*," were put up by the Plaintiffs (mortgagees from *F.*) for sale by auction, and were bought by the Defendant. A day was fixed for completion of the purchase, when rents or possession were to belong to the purchaser. At that day *F.* was still in possession, and remained so until he was turned out by the sheriff, more than a month after. The purchaser had agreed to let the houses to a tenant as from a day five days later than the day fixed for completion, but the tenant, finding that he could not have immediate possession, had refused to take the houses, which had remained unoccupied, and had also been damaged by the removal of some fixtures and otherwise. The vendors brought an action for specific performance simply. The Defendant counter-claimed for specific performance with compensation:—

Held, that the purchaser was entitled to damages in the nature of com-

pensation for loss of a tenant, and that the damages would be the amount of rent lost.

Bain v. *Fothergill* (1) distinguished.

Held, that the purchaser was entitled to damages for the deterioration of the property.

Phillips v. *Silvester* (2) followed and discussed.

THE *Royal Bristol Permanent Building Society*, the Plaintiffs in this case, were mortgagees of two leasehold houses at *Penarth*, and under their power of sale put them up for sale by auction on the 14th of October, 1885, in two lots, under conditions that the purchase was to be completed on the 11th of November. In the particulars it was stated that each lot was "recently in the occupation of Mr. *Fleming*." The conditions were in a form used by the building society, the 15th being that "the rents or possession will be received or retained and the outgoings discharged by the vendors up to the day appointed by the special conditions of sale for the completion of the purchase, and as from that day the outgoings shall be discharged and the rents or possession shall belong to the purchaser; but unless otherwise provided by the special conditions he shall not be let into the actual possession or receipt of the rents until the completion of the purchase." By the 16th it was provided that if the delay in the completion of the purchase should arise from any cause other than the neglect of or default of the purchaser, and if he deposited the remainder of the purchase-money in the bank named in the special conditions, the vendors should during the continuance of such deposit be entitled to the interest on the deposit, and not to the rents and profits.

T. S. Bomash, the Defendant, became the purchaser, and signed an agreement with the conditions annexed, and paid the deposit. The houses were at the time still in the occupation of *Fleming*, the mortgagor, who was said to be insolvent; and *Bomash* refused to complete until he could have actual possession. Many letters passed between the parties, and on the 10th of November the building society brought an action of ejectment against *Fleming*. The sheriff went into possession on the 14th of December, and *Fleming* was turned out on the 15th, or the following day, but as

(1) Law Rep. 7 H. L. 158. (2) Law Rep. 8 Ch. 173.

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to the exact dates there was some dispute. The sheriff did not give the keys to the building society until the 28th of December. *Bomash* had refused to take possession until the building society could give possession, and the building society had not offered to give possession until the 12th of December. He had refused to complete without compensation for the loss of a tenant, and he had also claimed damages for injury by removal of the fixtures and otherwise, and also claimed certain fixtures. Several offers for a settlement were made on each side, and not accepted by the other side. The houses had remained vacant. Proposals had been made for their being let without prejudice, but the parties could not agree as to the terms.

The building society on the 17th of December, 1885, had brought this action for specific performance simply. The Defendant alleged that he had bought the houses in the belief that they were vacant, and with a view of immediately letting them; and that he had lost a tenant by not having possession: and by counter-claim he claimed specific performance with damages. It appeared that soon after he became the purchaser, he agreed to let one of the houses to one *Wilson* for fourteen years, and *Wilson* was to have possession on the 16th of November, but as he found that he could not then have possession the agreement was broken off. *Bomash* also claimed some fixtures. The decision on that point was against him, and does not require to be reported. He had on the 28th of November deposited the balance of his purchase-money in the bank.

E. Ford, for the Plaintiffs:—

The Plaintiffs were ready to complete within a reasonable time, and it was only a delay of a few days. The Defendant alleges that by that delay he lost a tenant, but that is not a thing for which compensation or damages can be obtained: *Bain* v. *Fothergill* (1).

The Plaintiffs' witnesses were then examined.

Vernon R. Smith, for the Defendant:—

The Defendant is willing to complete, but is entitled to com-

(1) Law Rep. 7 H. L. 158.

pensation for not having got possession at the appointed time as the particulars led him to expect: *Hughes* v. *Jones* (1). He has really incurred a loss through no default of his own. The vendors knew all about it, and might have got *Fleming* out sooner. *Foster* v. *Deacon* (2) was a very similar case.

The Defendant's witnesses were then examined.

Vernon R. Smith, summed-up:—

The Plaintiffs are also liable for waste, as the property has deteriorated by the manner in which the fixtures were removed and by remaining unoccupied: *Phillips* v. *Silvester* (3). At all events the Plaintiffs cannot get specific performance without allowing compensation, which they have refused: *Jaques* v. *Millar* (4). *Engel* v. *Fitch* (5) shews the measure of damages when it is a question of possession and not of title: *Hadley* v. *Baxendale* (6). The Plaintiffs have made no offer, and ask for simple specific performance. Not only could they not complete at the time fixed, but they actually issued the writ before they had possession.

KEKEWICH, J.:—I do not wish to hear any reply as to the fixtures, and I will at once decide that part of the case. [His Lordship then decided against the claim by the Defendant to certain fixtures.]

E. Ford, in reply, on the other points:—

The particulars do not state that the property is vacant but only that the purchaser is to have possession or the rent. We could if we had been required have turned out *Fleming* at any time, and he was turned out within a reasonable time. The purchaser refused to take possession from the sheriff, but for this purpose he was the vendors' agent. The purchase might have been completed on the 14th of December, and the utmost damages can be for rent from the 28th of November to the 14th of December. If the Defendant had asked for that it would have been given at once. As to deterioration and loss of rent

(1) 3 D. F. & J. 307.
(2) 3 Madd. 394.
(3) Law Rep. 8 Ch. 173.
(4) 6 Ch. D. 153.
(5) Law Rep. 3 Q. B. 314.
(6) 9 Ex. 341.

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that is entirely the fault of the Defendant, who ought to have taken possession.

KEKEWICH, J.:—

I have now to dispose of two questions, which depend more or less on the main question who is in default. In saying this, I do not wish to cast any blame upon either party. In the correspondence the solicitor on the one side has, on behalf of his client, contended very fairly for his view; and the solicitor on the other side has contended very fairly for his view, and I must decide which of the two is right.

The first question is as to the possession. I have no doubt, quite independently of the case of *Hughes* v. *Jones* (1), that this contract was a contract for the sale of these houses, with vacant possession. I have no doubt that this contract contains what I may describe as a guarantee that on completion of the purchase the purchaser would be let into possession. That being so, and it being admitted on all hands that he could not have possession at the date fixed for the completion of the contract, and could not have had possession until either the 15th or 16th of December, the question is, whether the purchaser or the vendors were in default, and whether, if the vendors were in default, the purchaser is entitled to any and what compensation.

Mr. *Ford* has argued with considerable force that the sheriff could have given possession and would have given possession to the purchaser on a day which would have satisfied all the reasonable requirements of the purchaser. I do not think that a purchaser having a contract to sell with vacant possession, is bound to take possession from the sheriff when he knows, as he did know in this case, that the man to be evicted, the man who had been holding over, was still on the premises and would have to be turned out by force. I think the purchaser is, under those circumstances, entitled to say, "Exercise your rights; first turn the man out, and then give me vacant possession."

Therefore I think the vendors were in fault, that they had contracted to give vacant possession, that they were not prepared to give vacant possession at the time when the contract ought

(1) 3 D. F. & J. 307.

to have been completed, and that in fact the purchaser could not have got within a reasonable time that vacant possession for which he had contracted; and to that extent he has obtained something less than that which he contracted to buy.

Now, the question is, whether he is entitled to be compensated for that? On the 2nd of November, 1885, that is, before the date fixed for the completion, he entered into an agreement with a Mr. *Wilson* to let him these houses for a term of fourteen years at the yearly rent of £85, and that was to be completed on the 16th of November, 1885. The day of completion of the original contract having been the 11th, there was five days' margin. As a matter of fact, Mr. *Wilson's* contract went off. He wanted vacant possession; he could not get vacant possession; and on some day not accurately fixed, but varying, I think, from the 16th to the 23rd of November, 1885, he threw up his bargain, as he was entitled to do. He was cross-examined to shew that he was willing to stay on. I dare say he was. The premises seemed suitable to him. He does not seem to say that it was too much rent to pay, and it may be that after all he will take them; but was the purchaser bound to urge him to wait, and can we say now that Mr. *Wilson* was not reasonable in throwing them up? At that time there was no proof that Mr. *Fleming* would be turned out at any particular day. He was still in possession, and was apparently not intending to go out, and I do not think Mr. *Wilson* acted otherwise than prudently in throwing up a bargain of that kind, nor that the purchaser acted otherwise than prudently in acquiescing, and saying, "I cannot help it. I am not prepared to give you the possession which I bargained for, and I must part with you." Therefore the Defendant suffered some reasonable loss. I think he might fairly presume that the vendors would do their duty and get rid of *Fleming*, so as to complete the contract say by the 3rd of December; and I do not think it was an unreasonable contract for him to enter into. He did enter into it, and lost it; and he claims to be compensated for that loss.

This question deals with a branch of law which is very difficult, and for this reason, that there is certainly a distinction between compensation and damages. It has always been held that a purchaser may, if he likes, take specific performance with com-

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pensation, though a vendor cannot force it upon him; but where what he wants is strictly damages, such as were claimed in *Bain* v. *Fothergill* (1)—damages for the loss of a bargain where the title has failed—then it has been held that he cannot get those damages. The question here is not, whether this is compensation or damages, because the distinction is not sufficiently defined for that, but whether it is damages in the nature of compensation or not. In the second edition of Lord Justice *Fry's* book on Specific Performance (2) the distinction is drawn, and he refers to a case of *Prothero* v. *Phelps* (3), in which damages were given in the nature of compensation. I hold the distinction applicable here, and giving the purchaser damages in the nature of compensation, I must consider what is the proper measure of those damages. There again I am assisted by the case of *Jaques* v. *Millar* (4): Lord Justice *Fry* (then Mr. Justice *Fry*) says in his judgment (5): "The question of damages is a more difficult one. Damages are claimed, in addition to the specific performance of the agreement, in respect of the delay which was caused by the defendant's wilful refusal"—here it is the Plantiffs' refusal, though there is no wilful refusal on their part, and I do not impute it to them—" to perform his contract, and the consequent loss of profit to the plaintiff. I think I am at liberty to consider what would have been the value of the possession of the premises to the plaintiff for the period between the 5th of September, 1876, and the time when he actually obtained possession of other premises. I shall not attempt to explain in detail the motives which operate on my mind. But I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract." I hold this case to fall not within *Bain* v. *Fothergill*, which seems to me to deal with a different class of circumstances altogether, but to fall within a class of case which is illustrated by *Jaques* v. *Millar*, and I must give the Defendant damages calculated on some such

(1) Law Rep. 7 H. L. 158.
(2) Page 550.
(3) 7 D. M. & G. 722.
(4) 6 Ch. D. 153.
(5) 6 Ch. D. 159.

principle as Lord Justice *Fry* indicated. I think that the proper way of doing that is simply to take the rent which he would have received under that contract, against which there is nothing to set off. That seems to me to be the reasonable way of dealing with the case. I take it at a year and three months roughly, and I shall award the Defendant £110 damages by way of compensation for not having obtained that vacant possession which I think he was entitled to under the contract.

There is one other question, and that is the question of deterioration of the premises after the date of the contract. I have to consider what was the duty of the vendors. The duty of the vendor was considered in *Foster* v. *Deacon* (1), which was cited to me on behalf of the Defendant; but I prefer to turn to the later case of *Phillips* v. *Silvester* (2). There Lord *Selborne* in substance says that the vendor under a contract of sale of real estate is a trustee for the purchaser. Of course we all know that he is only a trustee in a modified sense. There are many things to be done before he becomes a mere trustee; but still Lord *Selborne* says he is a trustee, and I have no doubt that that is the right position, and I so decide. He deals with the question on page 177. I will not read his language at length; but what it comes to is this, that a vendor having property under his control in his possession which he has contracted to sell, is bound to keep it in a reasonable state of repair, so that a purchaser may take the thing which he has contracted to buy, unless there are some special circumstances which alter that obligation. He suggests the possibility of a case where the expenses of repair might be greater than those which the property would bear, and cases of that kind might of course occur. But the general nature of the case is what I have stated. It happened to fall to my lot to appear in that case on further consideration before Sir *George Jessel*, and I know that very large sums were recovered under the inquiries which Lord *Selborne* directed.

Mr. *Barber* was good enough to refer me to *Dart* on Vendors and Purchasers (3), in which comments are made on *Phillips* v. *Silvester* as with the authority of the Master of the Rolls, Sir

(1) 3 Madd. 394. (2) Law Rep. 8 Ch. 173.
(3) 5th Ed. p. 650.

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George Jessel, who decided the case on further consideration. That makes me still more regret than I did before that the case was not reported on further consideration. Mr. *Barber* tells me that these comments were shewn to Sir *George Jessel* and had his authority. It is not for me to say whether the remarks are sound or not. If I may venture to express an opinion, they do seem to me to be sound; but at the same time I am when sitting here no more entitled to depart from *Phillips* v. *Silvester* (1) than the Master of the Rolls was when he was sitting on further consideration in that case. I must take *Phillips* v. *Silvester* as laying down the law, unless in the remarks made upon it (which I may take to be Sir *George Jessel's* remarks) I can see established some exception to the general rule as laid down by Lord *Selborne*. I do not find any such exception; and on turning to the case of *Earl of Egmont* v. *Smith* (2), I find the Master of the Rolls himself stating the obligation of the vendor precisely in the language which was used by Lord *Selborne*. He says, that it is the duty of the vendor to relet the farms, which he had sold to the purchaser, as to which he says (3), "I have no doubt whatever." But I rely on this passage: "He is certainly a trustee for the purchaser, a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee." Therefore I regard the vendors in this case as trustees for the purchaser—from the date of the contract. I think they ought to have taken that reasonable care of the property which would have prevented it being damaged by *Fleming* in the exercise of his legal rights, or by any one who removed the fixtures, or by vagrants or other persons coming in, or by people who broke windows, or anything of the kind. I think they ought to have kept it in a reasonable state of repair, and the evidence proves conclusively that they have done nothing of the kind. The place is much dilapidated. It is difficult to say how much would put it in repair, because the evidence on that point has been mixed up with that as to the removal of the fixtures; but I think it right and fair under the circumstances to award £25 under that head. Therefore there will be judgment on the

(1) Law Rep. 8 Ch. 173. (2) 6 Ch. D. 469.
(3) 6 Ch. D. 475.

claim and counter-claim for specific performance, and for the payment by the Defendant to the Plaintiffs of the purchase-money with interest until the agreed day when the money was deposited in the bank, with the following deductions:—£1 for damage to the garden, £110 as compensation for the want of vacant possession, and £25 for the damage to the property since the date of the contract. That is a mere matter of arithmetic, which can be worked out on the face of the judgment.

Then as regards the costs. I think that though the question about the fixtures has been treated as being much more important than to my mind was at all necessary, still it has been treated as an important question, and costs have been incurred about it. I think the Defendant has failed as regards that, and he must pay those costs. The Plaintiffs must pay the general costs of the action.

Solicitors for Plaintiffs: *Mead & Daubeny*, for *Fox & Whittuck*, *Bristol.*

Solicitors for Defendant: *Smiles, Binyon, & Ollard*, for *T. H. Belcher*, *Cardiff.*

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March 25, 26, 29; Apr. 2.

LADYWELL MINING COMPANY *v.* BROOKES.

[1884 L. 2784.]

LADYWELL MINING COMPANY *v.* HUGGONS.

[1884 L. 3829.]

Company—Promoters—Purchase of Mine by Syndicate—Resale to Company—Rescission impossible—Fiduciary Relation — Principal and Agent—Sale of Agent's own Property to Principal.

On the 1st of February, 1873, five persons (one of whom was a solicitor and conducted the negotiations) purchased a leasehold mine for £5000 with the view of reselling it to a company to be formed: but they had at that time taken no steps to form any company. They completed their purchase on the 17th of March, 1873, the purchase-money being paid out of their own moneys, and on the 4th of April they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000. On the 8th of April the company was registered under the *Companies Acts*, its principal object being, as stated in the memorandum of association, the purchase of the mine, and in its articles the contract of the 4th of April, 1873, was adopted and confirmed, and four of the vendors were named as directors; but the contract of the 1st of February, 1873, was not disclosed to the company. The whole of the shares were placed by the vendors, and the share capital (£30,000) paid by them. At the same time they received £18,000 from the company as the purchase-money for the mine. In 1882 the company was wound up voluntarily, and in the course of the winding-up the facts relating to the purchase of the mine by the vendors became known to the company. In 1883 the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions against the executors of three deceased vendors and the two surviving vendors to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary position to the company:—

Held (affirming the decision of *Stirling*, J.), first, that the evidence did not prove that the vendors when they purchased the mine were promoters of, or in a fiduciary position towards, the company which was ultimately formed; secondly, that assuming that the vendors committed a breach of duty in not informing the company after it was formed that the mine was their own property, and consequently that the company might have rescinded the contract, yet as rescission was now impossible the company could not recover from them the profit which they had made. The actions were accordingly dismissed.

In re Cape Breton Company (1) followed.

THIS was an appeal from a judgment of Mr. Justice *Stirling* (2). The facts were shortly as follows:—

For some years prior to January, 1873, the *South Salop Mining*

(1) 29 Ch. D. 795. (2) 34 Ch. D. 398.

Company (*Limited*), had worked a lead mine known as the *Ladywell Mine*, which they held under a lease from Mr. *J. More*: and having exhausted their capital they resolved to sell their interest in the mine and plant. Negotiations were accordingly opened in the month of January, 1873, by Mr. *North*, the chairman of the company, with Mr. *Palin*, a solicitor, for the sale of the mine, which resulted in an agreement, dated the 1st of February, 1873. From the communications between *Palin* and *North*, it appeared that *Palin* was acting on behalf of others as well as himself, and that they contemplated the resale of the mine to a new company to be formed for the purpose of taking over and working it. This was specially evidenced by letters from *North* to *Palin* of the 8th and 10th of January, and of *Palin* to *North* of the 9th and 22nd of January, 1873, in all of which mention was made of the proposed new company and of the number of shares which were to be reserved for the shareholders of the *South Salop Company* if they should wish to take them. But no steps had been taken to form a company at the date of the agreement of the 1st of February, 1873.

That agreement was made between the *South Salop Mining Company* of the one part, and Messrs. *Brookes*, *Palin*, *Mundey*, and *Waters* of the other part, and provided for the sale to the four associates of the *Ladywell Mine* and all the plant, machinery, and effects, for the sum of £5000. It further provided that £500 should be paid down as a deposit, and the balance of the purchase-money on the 1st of March, 1873; and that upon payment of the balance of purchase-money as aforesaid the company would procure a new lease of the mine to the purchasers or their nominees for twenty-one years.

The deposit was duly paid, and the balance of the purchase-money was paid on the 17th of March, 1873. These sums were paid by the purchasers out of their own moneys in the proportions in which they were interested in the purchase; and on the 17th of March, 1873, *J. More* demised the *Ladywell Mine* to Messrs. *Brookes*, *Mundey*, *Oldrey* and *Waters* for twenty-one years from the 1st of January, 1873. The lease contained a stipulation for the protection of the lessor in case the lessees were trustees for a joint-stock company.

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By an agreement dated the 4th of April, 1873, and made between Messrs. *Mundey*, *Oldrey*, *Palin*, *Brookes*, and *Waters*, thereinafter called the vendors, of the one part, and *F. R. Wilson*, as agent of the *Ladywell Mining Company*, therein called the purchasers, of the other part, it was agreed that the said vendors, according to their respective rights and interests, should sell, and the said purchasers should purchase the lease of the 17th of March, 1873, and the plant and machinery upon and about the said mining premises for the sum of £18,000.

The *Ladywell Mining Company*, who were the Plaintiffs in the present action, was registered on the 8th of April, 1873, under the *Companies Act*, 1862, with limited liability, and with a nominal capital of £30,000, divided into shares of £2 10*s.* each. The memorandum of association provided that the objects of the company were (*inter alia*) to purchase a lease or leases of the *Ladywell Mine*: and the 3rd clause of the articles of association provided that the agreement of the 4th of April, 1873, should be and was thereby ratified and confirmed, and should be binding on the company. The first directors of the company were Messrs. *Palin*, *Brookes*, *Mundey*, and *Oldrey*, and one *W. Græme*.

On the 9th of April, 1873, the first board meeting of directors was held, at which all the directors were present, and also *Waters*. At this meeting the whole share capital was allotted to the directors and other persons who were stated to have applied for shares. In many cases the shares had been sold by the vendors of the mine at a premium before the registration of the company. The whole of the £30,000 had been paid into the bank, before the meeting, by *Palin*, *Brookes*, and *Mundey*. At the same meeting the vendors received cheques from the Plaintiff company for the £18,000 in proportion to their interests, and on the 2nd of July, 1873, the lease of the 17th of March, 1873, was duly assigned to the Plaintiff company.

No express notice was given to the Plaintiff company of the agreement of the 1st of February, 1873, or of the amount of the purchase-money then paid for the mine.

Mundey died in May, 1875, *Palin* in September, 1876, and *Oldrey* in November, 1880.

In January, 1882, the company having proved unsuccessful, a

resolution was passed to wind it up voluntarily; and in the course of the winding-up the company discovered the facts relating to the purchase of the mine in February, 1873. Early in 1883 *J. More* brought an action against the company and the lessees to recover possession of the mine and for damages. Judgment was given by default against the defendants, and *More* obtained possession of the mine in August, 1883.

In October, 1884, the Plaintiff company commenced an action against *Brookes* and *Waters*, and shortly afterwards they brought the second action against the executors of *Mundey*, *Palin*, and *Oldrey*.

In the second action the Plaintiffs claimed (1) a declaration that *Mundey*, *Oldrey* and *Palin* were promoters of the Plaintiff company; (2) a declaration that the adoption and approval of the agreement of the 4th of April, 1873, and the payment of £18,000 out of the assets of the company to the vendors of the mine was a breach of trust and duty on the part of *Mundey*, *Oldrey* and *Palin*; (3) that the agreement of the 4th of April, 1873, might be declared not binding upon the company, and that the Defendants might repay to the company out of their testators' estates the said sum of £18,000; or any profits which their respective testators had made in connection with the formation and promotion of the company, and with the payment of the said purchase-money of £18,000; and for accounts on the footing of these declarations.

The claim in the action against *Brookes* and *Waters* was substantially to the same effect. In the first action a compromise was effected between the Plaintiff company and *Waters*, and in the second action proceedings were stayed against *Oldrey's* executors.

When the actions came on for trial, Mr. Justice *Stirling* dismissed both actions with costs; and the Plaintiff company appealed from this judgment. The arguments on the appeal were principally directed to the claim against *Palin's* executors, it being understood that if the Appellants did not succeed against them, they could not sustain the appeal against the other Defendants.

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Seward Brice, Q.C., and *A. N. Cumming* for the Appellants:—

Palin and his associates were promoters of the new company from the outset. This is evidenced by the correspondence between *Palin* and *North*; it was agreed between them and *North* that the *South Salop Company* should have a certain proportion of the shares; they were directors of the company when it was formed; and the lease when granted dated back to the 1st of January, 1873. They were therefore in a fiduciary relation to the new company, and are liable to refund the secret profit which they made by their purchase and re-sale to the company: *Lydney and Wigpool Iron Ore Company* v. *Bird* (1); *Bagnall* v. *Carlton* (2). The liability is joint and several, and the executors of the deceased promoters are liable: *Imperial Mercantile Credit Association* v. *Coleman* (3); *Ramskill* v. *Edwards* (4); *In re Carriage Co-operative Supply Association* (5). But if *Palin* and his associates were not promoters on the 1st of February, 1873, when they purchased the mine, they became so afterwards, and ought to have disclosed to the company the price which they had paid for the mine. They were in the position of agents selling their own property to their principal: *Kimber* v. *Barber* (6). It is said that the proper remedy of the company in such a case would have been rescission of the contract, and that as that is now impossible the doctrine of *In re Cape Breton Company* (7) applies, and they have no remedy. But that doctrine does not apply to cases in which the rescission has become impossible without any act of the principal. In that case the company had elected not to rescind the contract, but to confirm the contract and to sell the property. In the present case the company have had no opportunity of election after they discovered the true facts. The property has been taken away from them by the landlord. There is no authority for a principal being deprived of his rights against the agent in such a case. *Rothschild* v. *Brookman* (8) is in our favour. We claim the difference between the £5000 paid by *Palin* and his

(1) 33 Ch. D. 85.
(2) 6 Ch. D. 371.
(3) Law Rep. 6 Ch. 558; 6 H. L. 189.
(4) 31 Ch. D. 100.
(5) 27 Ch. D. 322.
(6) Law Rep. 8 Ch. 56.
(7) 29 Ch. D. 795.
(8) 5 Bli. (N.S.) 165.

friends to the *South Salop Company* and the £18,000 for which the mine was sold to the new company: *Duke of Leeds* v. *Earl of Amherst* (1); *Hichens* v. *Congreve* (2).

Hemming, Q.C., *Buckley*, Q.C., and *Grosvenor Woods*, for the Respondents:—

No doubt *Palin* and his associates contemplated the formation of a company when they purchased the mine, but there is no evidence that they bought it for the company which was ultimately formed, or that when they bought it the company was so far formed as to entitle it, when formed, to claim the benefit of the purchase. They had, in fact, taken no active steps towards forming the company. Nor is it proved that any persons were induced to take shares on the faith that the company was buying the mine from the *South Salop Company*. It is also clear that the purchase-money was not, in fact, found by the new company, but came entirely out of the pockets of *Palin* and his associates. There was no bargain between *Palin* and his associates and the *South Salop Company* that a new company should be formed, and if they had pleased they might have kept the mine for themselves without forming any company. Therefore, we say that at the date of their purchase and until they agreed to become directors they stood in no fiduciary relation to the new company with respect to their purchase of the mine: *Gover's Case* (3); *New Sombrero Phosphate Company* v. *Erlanger* (4).

With respect to the second point, it may have been the duty of *Palin* and his associates to inform the company that the property was their property: and the company may have had a right to rescind the contract if they had done so in proper time, though if necessary something might be urged against this. But rescission is now impossible, and the case is covered by *In re Cape Breton Company* (5).

[They were stopped by the Court on this point.]

Seward Brice, in reply.

(1) 20 Beav. 239.
(2) 1 Russ. & My. 150.
(3) Law Rep. 20 Eq. 114; 1 Ch. D. 182.
(4) 5 Ch. D. 73; 3 App. Cas. 1218.
(5) 29 Ch. D. 795.

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1887. April 2. COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *Stirling* dismissing the Plaintiffs' action with costs. The action was brought by the liquidator of the *Ladywell Mining Company* in the name of the company, which is being wound up, against several Defendants. Although there are two actions and two appeals, the one really argued before us was that against Mr. *Palin's* executors, and I will give my judgment in that case and see how it applies to the other afterwards. The *Ladywell Mine* had been held by a company called the *South Salop Mining Company*, and they got into difficulties before January, 1873. Mr. *North* was the chairman of that company, and in and before January, 1873, negotiations took place between Mr. *Palin*, who was a solicitor, and Mr. *North* with reference to the sale to Mr. *Palin* and those acting with him of this mine. On the 1st of February, 1873, an agreement was entered into between the *Salop Company* and *Palin* and others in order to carry out that sale. It was part of the contract that a new lease should be granted—whether there was or not any existing lease at that time—by *More*, who was the owner of the mine, to *Palin* and his friends. It is material to observe that that contract was an absolute contract—although, of course, depending upon whether the *Salop Mining Company* could induce *More* to grant the lease which was to be granted according to the contract to *Palin* and his friends. On the 17th of March the lease was in fact granted. *Palin* was not a party to the lease, though he was a party to the contract. That lease was granted under the contract with *Palin* and his friends. On the 4th of April *Palin* and his friends made a contract with a person, whose name is immaterial, who was ostensibly the trustee for the company to be formed, and then, on the 8th of April, the *Ladywell Mining Company* was formed by being registered under the Act, and carried on the business for some time. But in January, 1882, it was wound up, and very shortly after that *More* brought an action against the lessees for breach of the covenants contained in the lease, and recovered in ejectment and got possession of the mine. In October, 1884, these actions were commenced in the name of the company. The actions were brought in order to make the Defendants answerable for the profit which they had

made in the transaction. The sale to them was for a sum of £5000 by the contract of the 1st of February, 1873, but the price in the contract of the 4th of April was £18,000. The claim was put in two ways. First of all, it was contended that at the time when the contract for the purchase of the mine was entered into by *Palin* and his friends they stood in such a position that they could not claim to have bought the mine for themselves, and could not, therefore, sell it at an advanced price to the company. Secondly, it was said that even assuming that was not made out, yet *Palin* and his friends were directors and they made a large profit, and even if they were not, at the time when they acquired this mine, trustees for the company—I think the word "promoters" was used, but I put it in more intelligible words—yet that they must be called upon to give up the profit which they put into their pockets.

Now, I will take the second point first, because we may shortly dispose of it. That argument assumes that *Palin* and his friends were not in a fiduciary relation to the company afterwards formed at the time when they entered into the contract by which they bought the mine. On what ground is it to be said that they can be made to account for profit? It was put in two ways. It was contended in the first place that they were authorized as directors of the company to buy the mine, but they were not authorized to buy it from themselves, and that, therefore, they might be made liable for the difference between the £5000 and the £18,000. But that I think is disposed of at once when we look at the articles of association, which expressly direct that the contract between these persons whose names are mentioned and the trustee for the company should be adopted and carried into effect. Independently of that, it is said that these directors could not, being in that position, receive and retain a profit which it was not known they were making. I do not enter into that question at length in this case, because assuming, as I do for the purpose of this argument, that if, when the *Ladywell Mining Company* had still got this mine, before it was recovered by the landlord, they would have been entitled to set aside the purchase by the company of this mine (about which there might be more difficulty than at first struck me, having regard to the terms of

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the memorandum and the terms of the articles of association), in my opinion this case is entirely covered by *In re Cape Breton Company* (1) which was before this Court, and to the decision in which I entirely adhere. It was attempted to distinguish this case from that by saying that the judgment of myself and Lord Justice *Fry* (who were the majority in that case) turned upon this—that the company in that case had adopted the purchase, and, therefore, there could be no decree, assuming that the person who sold to the company was at the time when he bought a trustee for the company. But really the decision did not turn upon that point. It is true that in that case there was a resolution not to dispute, but to hold to the contract, made, I think, after the company was wound up, but our judgment depended upon this—that it was impossible under the circumstances for the company to set aside the contract, and that this was so even although there might have been, and, in my opinion, would have been, a good ground for setting aside the contract, if impeached, while the property was still capable of being dealt with; yet as it could not be, the directors could not be held liable for the profit, whatever it was. One of the grounds was that it was difficult or impossible to ascertain the profit, and the company keeping the mine could not make a new contract and say, we will keep it not at the price our trustee contracted to give for it, but at a different price. I think, therefore, the distinction insisted upon between the two cases is not a material distinction with reference to the ground on which the majority of the Court formed their opinion in that case. I say nothing more upon this point except to refer to one case which was quoted by Mr. *Brice* of *Rothschild* v. *Brookman* (2). It was urged that in that case after the transaction was completed, so that the sale or purchase could not be set aside, relief was granted; and the judgment was approved by the House of Lords. But if we look at the judgment in that case it assumes throughout a setting aside of the transactions which were impeached, and it was a case where that could be done, because the case was this—that a client of *Rothschilds* had ordered them to buy certain Prussian bonds. *Rothschilds* had not done so, but having the money of the client in their hands

(1) 29 Ch. D. 795. (2) 5 Bli. (N.S.) 165.

they spent it in taking at the market price certain bonds held by themselves as securities. The House of Lords held that that might be considered as set aside, and an account was taken on the footing of their having the money in their hands, and not having purported to buy, as in fact they did not, any securities with that money. In my opinion, therefore, the second point fails as against *Palin's* executors.

Now I proceed to consider the first point, and that is one which, to my mind, requires a little more consideration than the other. It turns principally on a question of fact, and was not in any way decided by *In re Cape Breton Company* (1), where the purchase had been made a long while before the company was formed, or there was any thought of selling to the company. One matter is this—what is to be considered as the time of the purchase made by *Palin* and his friends? It was attempted to bring that down to the 17th of March, when the lease was obtained, but, in my opinion, that is erroneous, because the contract was really made on the 1st of February, 1873. All that was done as between the *South Salop Company* and *Palin* and his friends was the mere consequence of and carrying into effect the provisions of the contract of the 1st of February. It is true that in one of the documents that is called a provisional agreement; but really it was not provisional except in this sense—that effect could not be given to it unless *More* was persuaded to grant a lease to *Palin* and his friends. It was in its terms perfectly absolute and not dependent on any company being formed. It is undoubted that at that time—the 1st of February, and even before that—*Palin* and his friends did contemplate forming a company, and did contemplate not themselves working this mine, but dealing with it in the way of selling it at an increased price to the company to be formed. But no part of that purchase-money was to be provided for out of the funds of the company, or to consist of shares in the company; and, in my opinion, it is not sufficient for the Appellants to shew that it was contemplated that the company should be formed, or even that it was contemplated at the time when *Palin* bought this mine that he should sell to a company, and that he should not work it himself. If we need

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refer to any authorities *Gover's Case* (1) and *New Sombrero Phosphate Company* v. *Erlanger* (2)—the latter of which went to the House of Lords—establish that that is not sufficient. In *Gover's Case* not only was it contemplated that a company should be formed, but a considerable part of the purchase-money was to be provided for by shares in the company; and yet it was held there, when the question was whether a man was a promoter within the meaning of the Act of Parliament, that it did not make him a promoter at that time, and did not make him a person who stood in a fiduciary relationship to the company. In *New Sombrero Phosphate Company* v. *Erlanger*, although the Plaintiff obtained relief, it was on the footing of setting aside the contract; but Lord *Cairns*, when that case was in the House of Lords (3), refers to the point whether *Erlanger* and those who acted with him could be considered as, at the time they made the purchase, standing in a fiduciary relation, and negatives that. The time in that case between the two contracts was shorter than the time in the present case, and it was perfectly clear that it was contemplated that the island should only be bought for the purpose of being sold to a company to work it. What Lord *Cairns* says is this: "I stop at this point for the purpose of saying that I think it to be clear that the syndicate in entering into this contract acted on behalf of themselves alone, and did not at that time act in, or occupy, any fiduciary position whatever. It may well be that the prevailing idea in their mind was, not to retain or work the island, but to sell it again at an increase of price, and very possibly, to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked; to use it as they liked, and to sell it how, and to whom, and for what price they liked. The part of the case of the respondents which, as an alternative, sought to make the appellants account for the profit which they made on the resale of the property to the respondents, on an allegation that the appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871" (that

(1) Law Rep. 20 Eq. 114; 1 Ch. D. 182.

(2) 5 Ch. D. 73; 3 App. Cas. 1218.

(3) 3 App. Cas. 1234, 1235.

was the contract to buy the island), "is not, as I think, capable of being supported, and this, as I understand, was the view of all the Judges in the Courts below." We may, therefore, get rid of that. One thing which is very strong in favour of the Respondents—the Defendants here—is that the whole of the price of £5000 was, in fact, completely paid when the lease was granted out of their own money, and not in any way out of money provided by means of this company, £500 deposit having been paid on the 1st of February.

Then what other argument was there? It was said that *Palin* and his friends were undoubtedly, some time before April, promoters of this company, and the evidence not shewing when they began to act as promoters of this company, it must be assumed that they were, from the very first, in that position. I dislike the use of the word "promoter," but passing by that for the moment the argument, in my opinion, is not tenable. True, they became promoters some time before the company was actually formed—we do not know exactly when, and we do not know the circumstances connected with the promotion of the company, so far as regards the public being invited to take shares, if they ever were. But in my opinion it must be for the Plaintiffs to make out that at the time when this purchase was made *Palin* and his friends were so acting (I do not call them by the name of "promoters"), as that they were in a position which prevented them, if the company was afterwards formed —and I do not make any distinction between the company intended at the time and any company to be formed—from selling the mine to the company, because the company had already acquired a right to say that the purchase made by them was made for the company.

Now what evidence is there as regards those circumstances? If in fact those who purchased this mine had before the time they made the purchase invited the public to come in and join the company to work this mine, then it may well be that if the company was formed, and if they had handed over the mine to the company, the shareholders would have been entitled to say, "As you have formed a company to work this mine, you must admit that the purchase was not made in your individual capacity,

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but was made for the purpose of offering it to the public, if they came in and formed a company to work it." I will not say, because it might lead to difficulties hereafter, that that is the only ground on which persons can be said to be in a fiduciary position to a company which they are forming, and which is to work property which they have bought. Is there anything which will come up to that which I have mentioned? What is the evidence? The evidence consists only of certain letters, assisted to some extent by a proviso in the lease, which it is not very easy to understand, for the protection of the landlord—that he was not to be put in a different position from the fact, if it were so, that the lessees were trustees for the company to be formed. It is not explained how that was put in, and that of itself (although if there were other evidence on which we could rely it might be different) cannot make them trustees, simply because the landlord desired to protect himself against the possibility of their being or becoming so. What do we find in the letters? That the company was contemplated is undoubted; but the most striking point in those letters is this, that when they were dealing with *North*, with reference to the purchase of this mine, there was a requisition made by him and assented to by them that *North*, with any shareholders in the old *South Salop Company* who liked to take shares, should have shares in the company which was to be formed. But that was not part of the contract as between those persons and the *South Salop Company*, nor is there any resolution of the board of directors produced which made that part of the contract. Even if it were, we find from *Gover's Case* (1), if authority were necessary, that that would not put them in the position of being in a fiduciary relation towards the company which was afterwards formed, and which they were contemplating should be formed. The stipulation is easily explained in this way. *Palin* and his friends never brought out the company by issuing a prospectus, but they agreed some to take a certain proportion and some to take another proportion of the capital in the company, in proportion to the interest which they had in the mine. This was an arrangement between them, knowing that they had the control of all the shares if their

(1) Law Rep. 20 Eq. 114; 1 Ch. D. 182.

plan was carried out—an arrangement between them and *North* that he and such of his friends as desired it should have some of the shares. But that does not make them at the time when they entered into this contract persons so acting as to entitle the company afterwards to say, "When you bought this mine you were acting for us; this purchase, although made by you, is one that must be considered as having been made by you for the company which was afterwards formed at your invitation." If persons bought property in such a position, it would be wrong for them, the original purchase having been at a smaller price, to add to that price afterwards, and to put into their own pockets a further sum of money for the purchase of that which from the very first had been the property of that company. We have no evidence at all as to what took place with other persons who were invited to join. The evidence is left in a singular position, if in fact there was any evidence which would assist the case of the Plaintiffs that these persons were in a fiduciary position on the 1st of February, when the contract was entered into. As I stated, the contract was absolute, and not in any way contingent on the company being formed. The money was all paid by *Palin* and his friends and in my opinion they bought for themselves, and without putting themselves into such a position as to entitle the company when formed to say, "You were acting for us; you were in a fiduciary position as regards this property, and now, therefore, as you have purported to sell this to us, we are entitled to take it at the price you originally gave for it." That is an obvious equity. If a man is instructed as agent for another to buy property, whatever price he buys it for he must hand it over at that price to his principal, and he cannot as between himself and his principal, when he has bought at a lower price, add to it by pretending to sell to his principal that which he has already bought for his principal.

That, in my opinion, disposes of this case, and therefore the appeal against *Palin's* executors fails.

As regards *Brookes*, who was the Respondent in the other appeal, the case against him was not even so strong as the case against *Palin*. I say so, because, although we have not heard the details of the case against him, it was conceded that the question would

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really be how far that which was evidence against *Palin* could also be considered as evidence against *Brookes*. That appeal must follow the same result. Both appeals will be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. Considering the elaborate way in which this case was dealt with by Mr. Justice *Stirling*, and the length at which it has been explained by Lord Justice *Cotton*, I shall say very little. The case really breaks down for want of evidence. It appears to me, so far as I can understand the correspondence and such evidence as there is, that *Palin* had got up this company, and it was his duty to inform the company that the property it was formed to buy was his property; and not having done that (there is no evidence that he did, and some evidence that he did not) there might be a case for rescission if rescission were possible; but rescission is not possible because the property acquired by the company does not belong to the company any longer. The landlord has taken possession, and rescission is out of the question.

Then we are driven to consider the point which was really raised and decided in *In re Cape Breton Company* (1), whether rescission being impossible the company can obtain from *Palin* an account of the profit which he made by the transactions which have been alluded to, and that depends really upon the evidence. Having considered the whole correspondence, and having examined the evidence with care, I am not surprised at the shareholders being desirous of upsetting this transaction or getting relief if they can. But the evidence is not sufficient to enable them to succeed. It is not proved that when *Palin* bought—that is on the 1st of February, 1873, he bought for the company which was ultimately formed; nor that when he bought the company was so far formed as to entitle it or its members to claim the benefit of the purchase on any theory of trusteeship; nor is it proved that persons were induced to take shares on the faith that the new company was buying from the old company. It is plain that the new company did not, in fact, find the money with which the vendors were paid. Under those circumstances,

(1) 29 Ch. D. 795.

can we say that there was any such relation between *Palin* and the company as to entitle the company to say, "You bought for us"? It appears to me that the evidence is not sufficient for that purpose. If it were we could see our way to give relief; but in the absence of evidence going further than I have stated, I am of the same opinion as Mr. Justice *Stirling*, and I think the appeals should be dismissed.

LOPES, L.J.:—

I am of the same opinion. After the elaborate and exhaustive statement of Lord Justice *Cotton*, I have very few words to add in expressing my view. The question is did *Palin* and his associates on the 1st of February stand in a fiduciary position towards this company that was thereafter to be formed; or, in other words, were they then acting for the company about to be formed? If they were the Plaintiffs are entitled to succeed. This is entirely a question of evidence, and the Court has to place upon the evidence which is laid before it its proper effect and meaning. The evidence, after very careful consideration of it, does not satisfy me that *Palin* and his associates were acting on the 1st of February for the company about to be formed. According to my view, and the view that ought to be drawn from this evidence, they bought the mine themselves and paid for it out of their own pockets, no doubt with the intention of selling to a company thereafter to be formed; but there is nothing to shew that they were on the 1st of February acting for a proposed company. No person is called to say that they were asked to take shares by any of these vendors because they were forming a company. There is no evidence that in any shape or way they stood in such a relation to the company thereafter to be formed, as would entitle that company when formed, to say, "You made this contract for us—it is our contract, and we can only be required to pay the price which you, acting as our agent, paid for it." There is no evidence that can properly lead the Court to such a conclusion. If that is so, this case comes within the authority of *In re Cape Breton Company* (1). No doubt, having regard to the secret profit that was made by these vendors the company might have

(1) 29 Ch. D. 795.

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claimed rescission of the contract, but in the circumstances rescission had become impossible. The case, therefore, falls within the authority of *In re Cape Breton Company* (1), by which the Court is bound. I think, therefore, these appeals ought to be dismissed.

Solicitors for Plaintiffs: *Jackson & Co.*

Solicitors for Respondents: *John Holmes & Son; Snell, Son, & Greenip.*

M. W.

C. A. 1886 — CHITTY, J. *Oct.* 28, 29. — C. A. 1887 *March* 14, 15; *April* 5.

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[1885 H. 3108.]

Patent—Novelty—Prior Publication—Foreign Specification in Patent Office Library.

In December, 1878, and February, 1880, the specifications, in the German language, with drawings, of two patents taken out in *Germany*, were deposited in the free public library of the Patent Office; and the journal published periodically by the Patent Commissioners, amongst the list of patents granted in *Germany*, contained entries of the particular patents, with a note in each case that the specifications as well as the list of applications might be consulted in the free public library of the office.

In April, 1880, a patent was obtained in this country for an invention similar to those for which the German patents had been granted:—

Held (affirming the judgment of *Chitty*, J.), that the fair and legitimate inference from the above facts was, that the public availed themselves of the facilities afforded to them for obtaining information as to the inventions, and accordingly that there was sufficient evidence of publication of the German specifications in this country prior to the date of the English patent of 1880 to avoid such patent.

Held, also, that this inference was not affected by the fact that the prior specifications were in the German language.

Per Cotton and *Lindley*, L.JJ.:—*Primâ facie* a patentee is not the first inventor, if before the date of his patent an intelligible description of his invention, either in English or in any other language commonly known in this country, was known to exist in this country either in the Patent Office or in any other public library to which persons in search of information on the subject would naturally go for information. But if it be proved that the foreign publication, although in a public library, was not in fact known

(1) 29 Ch. D. 795.

to be there, the existence of the publication in this country is not fatal to the patent.

Per Lopes, L.J.:—The existence of the German specifications in the library of the Patent Office, where they were unreservedly accessible to every one, was in itself conclusive evidence of a prior publication.

Plimpton v. *Spiller* (1) and *Otto* v. *Steel* (2) distinguished.

SPECIAL CASE.

The Plaintiffs were assignees of letters patent for improvements in knitting machines, granted to *T. Coltman*, dated the 16th of April, 1880, and they claimed by their action to restrain an alleged infringement by the Defendant of such patent.

The Defendant alleged that there had been prior publication of the invention in this realm, and the following facts had been stated for the opinion of the Court by special case under Rules of the Supreme Court, 1883, Order XXXIV.:—

Prior to the date of the Plaintiffs' patent of 1880 the specifications and drawings of two patents granted in the German Empire for a similar invention were deposited and open for public inspection at the library of the Patent Office in *London*.

The first of these German patents (No. 2372 of the year 1877) was granted to *G. F. Grosser*, of *Markersdorff*; and the second (No. 8281 of the year 1879) was granted to *Seyfert & Donner*, of *Chemnitz*.

These specifications were in German, and the drawings on each specification were indorsed with German words.

For the purposes of the special case, it was assumed that if the specifications, or either of them, were translated into English, such translations, together with the drawings, would give sufficient information to a competent workman to enable him to carry out into practice the invention which is the subject of the Plaintiffs' patent. It was further assumed that the drawings were in themselves insufficient to give such information.

A periodical called the "*Commissioners of Patents Journal*" is published at the Patent Office. Copies are supplied to a large number of subscribers, and placed in the Patent Office Library, and from time to time the journals are bound into volumes and placed on the shelves of the Patent Office Library, where they are open to public inspection. The *Journal* of September, 1878,

(1) 6 Ch. D. 412. (2) 31 Ch. D. 241.

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amongst the list of patents granted in *Germany*, contained an entry of: "2372.—*G. F. Grosser*, of *Markersdorff*, *Saxony*, for a thread guide for knitting machines, dated 25th Aug., 1877, Class 25," with a footnote: "The specifications as well as the list of applications may be consulted at the Free Public Library of the Patent Office."

In the *Journal* of November, 1879, amongst the list of patents granted in *Germany*, appeared the number and title of the specification 8281 of the year 1879, with a footnote similarly expressed.

It appeared that the German specifications were usually received in parcels, and the numbers were at once entered in a book of the Patent Office. The specifications were then placed in boxes in numerical order and put upon the shelves of the library so as to be accessible to the public. When a sufficient number had been received the specifications were taken out of the boxes and bound into volumes which were placed upon the shelves of the library.

Specification No. 2372 was received at the Patent Office on the 9th of December, 1878, and with other specifications sent to the binder on the 25th of July, 1879, and returned to the office on the 27th of August, 1879.

Specification No. 8281 was received at the Patent Office on the 5th of February, 1880, was sent to the binder on the 19th of March, 1880, and delivered to the office on the 28th of July, 1880.

It was admitted by the Plaintiffs for the purposes of the action that in the event of the Court answering either of the following questions in the affirmative no rebutting evidence could be adduced by the Plaintiffs.

In these circumstances the following questions (as amended) were submitted:—

(1.) Whether, under the circumstances, there is sufficient evidence (if not rebutted) to prove the publication of the German specification (2372 of the year 1877) in this realm prior to the date of the Plaintiffs' patent, so as to avoid the said patent?

(2.) Which related to the German specification 8281 of the year 1879, was in similar terms.

The special case came on for hearing before Mr. Justice *Chitty* on the 28th of October, 1886.

Aston, Q.C., and *Bousfield*, for the Plaintiffs:—

There has been no such publication of the German specifications in this realm prior to the date of the Plaintiffs' patent as to make them part of the common stock of public knowledge. They must have been published in such a way as that (in the language of Mr. Justice *Pearson* in *Otto* v. *Steel* (1) which is, we submit, conclusive in our favour) there may be a reasonable probability that any person, and amongst such persons the English patentee, might have got from them the exact information which would have enabled him to make his machine. Adopting the test proposed by *Jessel*, M.R., in *Plimpton* v. *Malcolmson* (2), "Can it be considered to have been so communicated to the public as to become part of the common stock of public knowledge?"—the existence in this country of a single copy of a book in a foreign language in a public library does not raise any presumption of publication of an invention described in the book, without some proof that the invention in fact came to the knowledge of the public, unless the book has been placed in such a position that it may fairly be inferred that the contents of the book have become known to a sufficient number of people: *Plimpton* v. *Spiller* (3). The onus is on the person who disputes the patent of proving the prior publication. If it cannot be shewn directly that the particular information has actually come to the knowledge of that portion of the public which is interested in it, it must at least be shewn that the information was open and accessible to that portion of the public; that the fountain of knowledge has been one that runs freely. It is not sufficient to say that it "might have been," it must be shewn that it was; and in laying down the proposition that "if a sufficient number may be presumed to know it," that would be enough, the late Master of the Rolls went, we submit, too far.

[CHITTY, J.:—It is not a presumption, but an inference of fact.]

Is there anything to direct persons interested in the subject to the source of information? The mere deposit of a book on the shelves of a library accessible to the public, even with the assistance of a catalogue, and the assistance afforded by the attendant

(1) 31 Ch. D. 241, 243. (2) 3 Ch. D. 531, 566.
(3) 6 Ch. D. 412, 435.

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in the library, is not sufficient: *Otto* v. *Steel* (1). In this case, having regard to the plethora of information there existing, the mere fact that these specifications and drawings, together with some hundreds more relating to the same subject, were to be found in the Patent Office Library, and were catalogued in the journal of the office, tells the public nothing unless they are specially guided by further information to these particular specifications. And having regard to the subject-matter of this invention—not one of a highly scientific character, but relating to a process in common domestic use—the class of persons likely to seek for information would not, even if specially directed thereto, be able from their ignorance of German to make any use of these specifications which are in that language, and consequently intelligible to Germans only or persons conversant with that language; a knowledge of which the artisans of *Leicester* or *Nottingham* will not be assumed to possess: *Household Coal and Iron Company* v. *Neilson* (2). *United Telephone Company* v. *Harrison* (3) is distinguishable, as in that case the information was to be found in a book which, though in German, was the journal of a society devoted to the particular scientific subject, and a publication the existence of which could hardly be unknown to persons skilled in such matters in that country, and in which it was natural that they would search for information. Moreover, in this case the statement in the *Journal* that these specifications were in the library was false, as they were not there then or until some months afterwards.

[They also referred to *Best* on Evidence (4).]

Romer, Q.C., and *Goodeve*, for the Defendant:—

Is there not in the words of Mr. Justice *Pearson*, in *Otto* v. *Steel* (5), "a reasonable probability," on the facts before the Court, that any person might have obtained the necessary information from these specifications? We have the specifications of two prior patents obtained in *Germany* for the identical invention with that of the Plaintiffs and deposited in the very place where

(1) 31 Ch. D. 241.
(2) 1 Web. Pat. Cas. 673, 718.
(3) 21 Ch. D. 720.
(4) § 299.
(5) 31 Ch. D. 243.

persons interested in the subject would search for information; and, further than this, notice of the German patents was given by the Patent Office journal, "which is supplied to a large number of subscribers," that in the proper office are deposited the specifications of patents on this subject; and though the specifications were not actually in the office at the time when the journal containing the notice was published, any person applying at the office would be told, as was the fact, that they would shortly be there. Then it is objected that these specifications in German would not convey any intelligible information to the class of persons likely to consult the library. No distinction, however, can be taken between a German or French and an English specification for this purpose: *United Telephone Company* v. *Harrison* (1); *Lang* v. *Gisborne* (2).

[CHITTY, J.:—German cannot be treated in this country as an unintelligible language.]

Subject to the remarks of *Jessel*, M.R., in *Plimpton* v. *Malcolmson* (3), the law is correctly laid down by *Romilly*, M.R., in *Lang* v. *Gisborne* (4): "It is not at all necessary to establish the fact that one volume of that book" (a foreign one sent to a bookseller to be published in this country) "has been sold, for I think that as soon as an inventor informs the public of what his invention consists, and prints it in a book which he sends to a publisher to sell, from the moment that the book is exposed for sale in the bookseller's shop, there becomes, in point of law, a complete publication of the invention." If accessible to the public or that portion of the public conversant with this particular subject, it need not be shewn that the bulk or even a large portion of those people know it. "If a sufficient number know it, or if the communication is such that a sufficient number may be presumed, or assumed, to know it, that will do": *Plimpton* v. *Malcolmson* (5); *Plimpton* v. *Spiller* (6). In the Patent Office foreign specifications are treated just in the same way as English specifications, and are as open to the public and may be as freely consulted.

Aston, in reply.

(1) 21 Ch. D. 720.
(2) 31 Beav. 133.
(3) 3 Ch. D. 531.
(4) 31 Beav. 135.
(5) 3 Ch. D. 556.
(6) 6 Ch. D. 429, 435.

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CHITTY, J. (after stating the questions submitted to the Court, proceeded):—

A question of this kind is a question of fact, and really the only matters I have to consider are what are the fair inferences to be drawn from the facts admitted? Have these German specifications been published in this country in such a way as to become part of the common stock of public knowledge in this country? For that purpose it is not necessary to shew that the knowledge has been acquired by the public in general, or by the bulk of the public, or by any large number of persons; but if a sufficient number, as the late Master of the Rolls said in *Plimpton* v. *Malcolmson* (1), knew it, or if the means of communication are such that a sufficient number may be presumed or assumed to know it, that will do. Some comments have been made upon the language of the Master of the Rolls in that case, and probably if the Master of the Rolls had been asked to re-write his statement of the law, he would have stated it not as a matter of presumption or assumption, but as a legitimate inference to be drawn from the facts proved. Of course, the Master of the Rolls did not mean any such thing as that an assumption was to be made without sufficient grounds. I have now stated the case as it was put by the late Master of the Rolls, as I understand him; and it is put in the same way by Mr. Justice *Pearson*, in *Otto* v. *Steel* (2), and also in *United Telephone Company* v. *Harrison* (3) by Lord Justice *Fry*, who, in giving his opinion, said: "It appears to me that that is the fair inference from the facts proved before me." [His Lordship, after stating the facts, proceeded:—] The result, therefore, is that for a period, speaking roundly, of two and a half years these documents—that is, the German specifications and the German drawings—were in the free public library of the Patent Office, and, as the case states, accessible to any person who chose to go there. Then in the journal which the Commissioners publish, there is a notice of the fact that documents of that class are to be found in the public library, and it appears from the statements in the case, and particularly from the journal itself, that there was not only that notification given to those to whom the journal is sent—a large class of persons—but the Commissioners

(1) 3 Ch. D. 531. (2) 31 Ch. D. 241. (3) 21 Ch. D. 720, 731.

themselves classify the foreign patents. From examining the journal I have no doubt that the statement that there were 100 classes is substantially correct. Therefore the Commissioners, for the purpose of facilitating the access by the public to the documents which are thus deposited in their library, have classified them, and in this journal they have given a description. Now, upon that, it appears to me that the description given is sufficient to afford considerable facilities to any member of the public who desired to find the book or the document in question. For the purpose of the case the subject-matter of these specifications as well as of the Plaintiffs' specifications is to be taken as identical, and what the public are told by means of the journal is that a patent has been obtained in Germany for a thread guide for knitting machines; the class (No. 25) is specified, and they are told that that is in the library. It is said that the public were falsely told that the specifications were in the library; and, not using the words in an offensive sense, this statement is correct, because the German specification was not in the library at the time when the journal containing the footnote was published, but came there somewhere about a couple of months afterwards. Even making this deduction from the length of time I have already specified, there is a period of considerably more than two years during which the document has been in the public library ready for inspection.

Now, what is the fair inference with regard to the question whether the public did or did not avail themselves of these facilities? The late Master of the Rolls in dealing with different facts relating to this question in *Plimpton* v. *Malcolmson* (1), expressed himself with reference to the *British Museum* in this way. He says (2): "There was nothing to shew that it was not read or used; and in the absence of evidence to the contrary, the presumption was the other way." *Pearson*, J., having also before him in *Otto* v. *Steel* (3) a question relating to the *British Museum*, comments upon that, and expressing his dissent, says (4): "I find it very difficult indeed to go along with Sir *G. Jessel* in that presumption. I do not know the authority for it. He gives no authority for it"—and he

(1) 3 Ch. D. 531.
(2) Ibid. 560.
(3) 31 Ch. D. 241.
(4) Ibid. 245.

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apparently declines to adopt it. But I do not find any difference between the two learned Judges. What the Master of the Rolls was speaking of was, as I understand it, an inference of fact to be drawn from the facts proved; and with reference to the *British Museum*, the Master of the Rolls certainly went the length of saying that the fair inference was that a book in the *British Museum* was read. It is quite consistent with that that Mr. Justice *Pearson* was right in saying in the case before him that the fair inference was that the book was not read, because the circumstances were different. And in drawing an inference of fact from the facts that are proved, you must carefully attend to the facts which are proved before you can say what the inference is. I do not understand the late Master of the Rolls to have been expressing a proposition of law, but merely stating what he considered to be the legitimate inference to be drawn from the circumstances proved before him. Now, what is the fair inference to be drawn with regard to these documents? It appears to me, having regard to the length of time, having regard to the facilities which are offered by the fact that it is in the free public library, and having regard particularly also to the information which the Commissioners consider to be sufficient, and which, in my opinion, was sufficient, to lead the public to the discovery of these particular documents, the fair inference is that the public did avail themselves of the facilities thus afforded.

It is not necessary to go through the numerous cases that have been mentioned, because, as I have said, the inference is to be drawn in each case from the particular facts proved. The two cases on which the Plaintiffs relied, *Plimpton* v. *Malcolmson* (1) and *Otto* v. *Steel* (2), are as distinct from this in their circumstances as can be.

Take *Otto* v. *Steel*: the place was not one where a man would go specially to look for a book of inventions. The book, such as it was, was at the *British Museum* and was not in the public reading-room there, but, as the learned Judge described it, was a book in an inner room; and he thought that the fact that the book was to be found in the inner library of the *British Museum* was not sufficient publication for him to hold that what was

(1) 3 Ch. D. 531. (2) 31 Ch. D. 241.

found in that book had become part of the public stock of common knowledge.

Of course, I take it as part of the facts of this case, that it is admitted by the Plaintiffs that, for the purposes of the action, in the event of the questions being answered in the affirmative, no rebutting evidence—that no person had ever read the document or gone to the Patent Office library—can be given by the Plaintiffs. I am not at liberty to supply any other facts; I simply take them as they are stated.

Now, I have dealt with the main question in regard to the first specification, subject to an argument upon the fact that the specification was in the German language, as to the probability of persons in this country being acquainted with a foreign language so as to be able to avail themselves of the information contained in the specification. The Commissioners of Patents evidently think—although this is only a matter to be borne in mind and not matter on which my decision would turn—that it is useful to communicate to persons in this country the fact that there are patents obtained in *Germany*, and to say that they can come and read the specifications here in a public office in the German language. That at least shews that they consider there is a considerable number of persons in this country who are competent, by reason of their knowledge of the German language, to avail themselves of the information contained in the foreign language. I am entitled, sitting here as a Judge of fact, to say that there is a considerable number of persons in this country who are acquainted with the German language, and I am entitled also to say that there is a considerable number of Germans in this country, and I should be wrong in excluding those who are Germans by origin, who happen to be settled or resident in this country, from being considered as part of the public for the purpose of the question I have to decide. I decline to do that; I say they are part of the public.

Then this matter appears to me to be entirely covered by authority. In *Lang* v. *Gisborne* (1) Sir *J. Romilly* held that it made no difference that the document was in French: in *United Telephone Company* v. *Harrison* (2), Lord Justice *Fry* held that it made no difference that it was in German; and *Pearson*, J., in his

(1) 31 Beav. 133. (2) 21 Ch. D. 720.

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judgment in *Otto* v. *Steel* (1), expressed no dissent from that, but appears to treat the case as if there were no difference between a document in the English language and any one of what I may call the ordinary European languages—those which are to some extent known in this country. German is a language that is sufficiently known, and I have the opinion of at least two learned Judges that no difference ought to be made by reason of the document being in a foreign language, which is not one of those remote languages with which very few people in *England* would be acquainted. What I have stated appears to me to be sufficient to answer the first question in the affirmative.

With regard to the second question, which is exactly the same with the exception that the term is shorter, there being a period of about forty days only during which the public were entitled to avail themselves of the documents being in the free public library of the Patent Office, I think that I ought not to make any difference on this ground.

And with reference to the argument that was much pressed in reply as to the alleged misstatement contained in the footnote to the journal, it would be quite wrong I think to attribute any force to that error of statement in the journal, which said that the documents were at the office, when they were expected to be there and were there in a very short time afterwards. I answer, therefore, both questions in the affirmative.

F. G. A. W.

C. A.

From this decision the Plaintiffs appealed. The appeal came on for hearing on the 14th of March, 1887.

Aston, Q.C., and *Bousfield*, for the Appellants.

Romer, Q.C., and *Goodeve*, for the Defendant.

The same arguments were used and the same cases referred to as in the Court below.

1887. April 5. LINDLEY, L.J., delivered the judgment of himself and COTTON, L.J., as follows:—

The question in this case is in substance whether, under the circumstances stated in the special case, the Plaintiffs' assignor

(1) 31 Ch. D. 241.

was the true and first inventor of the patented invention claimed by the Plaintiffs. The Plaintiffs establish a *primâ facie* case by proving the patents, and they thus throw the burden of proof on the Defendant, and it is for him to prove, if he can, some prior use of the invention in this country, or some prior publication in this country of some intelligible description of the Plaintiffs' invention. This point was settled in *Amory* v. *Brown* (1), and, indeed, long before. In the present case prior use is not alleged. Prior publication is what is relied upon. The special case states in effect that before the date of the Plaintiffs' patent there existed in the library of the Patent Office two copies of two German specifications, each of which, with the drawings annexed to it, contained a description of the Plaintiffs' invention. One of these specifications had been in the library more than a year; the other had been there about six weeks. The existence in the library of these German specifications was not only known to the librarian, but attention had been called to the fact of their existence in the library by the publication in the *Commissioners of Patents Journal* of English translations of their titles: moreover, the specifications themselves were in their proper places in the library, and anybody wanting to see them could have done so. Whether any one other than the librarian did in fact ever see them is not known. It appears to us that on this evidence the burden of shewing that the English patentee was the first inventor in this country of his invention is again cast upon the Plaintiffs; and that unless they can shew that the German specifications were not, in fact, seen by any one who could understand them, the Defendant is entitled to succeed. If the case were being tried by a jury, we are not sure that the Judge might not direct them to find for the Defendant on the issue that the patentee was the true and first inventor. But on the present occasion it is unnecessary to decide this, and, without going so far as to say that the Judge ought to give such a direction we are clearly of opinion that the Judge ought at least to tell the jury to find for the Defendant on the issue that the patentee was the true and first inventor, if they thought that the German specifications had been so published in this country as to have become known to any one here; and to guide the jury on this

(1) Law Rep. 8 Eq. 663.

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point the Judge ought to tell the jury that the invention having been laid before the public in this country in the way and for the time mentioned in the special case, the invention ought to be presumed to have become known in this country in the absence of all proof to the contrary. Even if the case had turned solely on the publication of the second of the two German specifications, we should not be prepared to say it would be wrong to direct a verdict for the Defendant. But, assuming that it would not be right to go so far, the only question which could be properly left to them would be whether in their opinion the German specification had been published in this country long enough before the Plaintiffs' patent to have become known here. But this question really admits of but one answer, and we cannot suppose that any jury would find that six weeks were not long enough for such a purpose.

If the two German specifications had been in the English language we have no doubt that the Defendant would be entitled to succeed. It is familiar law that proof of the description in English of an invention in a book published in this country is fatal to the validity of a subsequent patent for the same invention. In such a case no evidence is necessary to shew that the book was in fact read or referred to. Proof that it had not been sold or circulated might no doubt be given, and if such proof were given the publication would not be fatal to the patent. This was pointed out by *Jessel*, M.R., in *Plimpton* v. *Malcolmson* (1).

The same rule is applicable to the proof of a publication by enrolment in the Patent Office of an earlier specification of the same invention. Although in this case there are not many copies published, but only one copy, still proof is never required that the specification has been actually seen by the public. No doubt specifications of patents are open to the observation that they stand on peculiar grounds; and that the second of two patents for the same invention must be bad in point of law. But the cases of *Patterson* v. *Gas Light and Coke Company* (2); *Oxley* v. *Holden* (3); *Bush* v. *Fox* (4) and *Betts* v. *Menzies* (5), not to mention others, shew that what is material in these cases is to

(1) 3 Ch. D. 559.
(2) 3 App. Cas. 239.
(3) 8 C. B. (N.S.) 666.
(4) 5 H. L. C. 707.
(5) 10 H. L. C. 117.

consider what was disclosed to the public in the earlier specifications. In order to shew that a patentee is not the true and first inventor of his patented invention it is not necessary to shew that he learnt it from a prior publication existing in this country. It is sufficient to shew that the invention was so described in some book or document in this country, as that some English people may be fairly supposed to have known of it. This is the result of *Household Coal and Iron Company* v. *Neilson* (1), *Stead* v. *Williams* (2), and *Lang* v. *Gisborne* (3). *Plimpton* v. *Malcolmson* (4) and *Plimpton* v. *Spiller* (5) are not opposed to this view of the law, for in those cases there was evidence which satisfied the Court that the one copy in this country relied on as a prior publication had not, in fact, been laid before the public, and was not, in fact, known to exist.

It is necessary next to consider the effect, if any, of these specifications being in German and not in English. The fact that German is understood by many people in this country, and that persons who can read and translate German can easily be found by those who want their assistance, must, we think, be treated as common knowledge and be judicially noticed, although not stated in the special case. There are very few reported cases relating to the anticipation of a patent by the existence in this country of a description of the invention in a foreign language.

In *Heurteloup's Patent* (6) the Privy Council confirmed a patent notwithstanding the existence in the *British Museum* of a French book containing a description of the invention. The confirmation was made under the provisions of 5 & 6 Will. 4, c. 83, s. 2. This statute was passed for the relief of *bonâ fide* inventors whose patents were liable to be defeated by prior publications unknown to them; and the statute authorized the confirmation of such a patent if the invention had not been publicly used in this country before the date of the patent. The fact that *Heurteloup's Patent* required confirmation goes far to shew that it would have been invalid unless confirmed under the provisions of the statute in question. Regarded from this point of view *Heurteloup's Patent*,

(1) 1 Web. Pat. Cas. 673, 718.
(2) 7 Man. & G. 818.
(3) 31 Beav. 133.
(4) 3 Ch. D. 531.
(5) 6 Ch. D. 412.
(6) 1 Web. Pat. Cas. 553.

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as far as it goes, is in favour of the Defendant rather than of the Plaintiffs.

Lang v. *Gisborne* (1) contains an emphatic expression of opinion by Lord *Romilly*, to the effect that there is no distinction between a publication in this country of a description in the French language and a description in English. Some remarks made by Lords *Brougham* and *Campbell* in *Househill Coal and Iron Company* v. *Neilson* (2), and in *Soames's Patent* (3) have been relied upon as inconsistent with Lord *Romilly's* view; but we do not so understand them. They merely go to shew that a foreign publication not known in *England* will not invalidate a patent.

In *United Telephone Company* v. *Harrison* (4) a German publication in the Patent Office and Library of Civil Engineers, and accompanied by drawings which were proved to have been seen and understood by one person was held to be so published here as to be part of the public knowledge on the subject to which it related. On the other hand, in *Otto* v. *Steel* (5), a French book in an inner room in the *British Museum*, but referred to in the catalogue in the public reading-room, was held not to be part of the public stock of common knowledge. In that case we understand the learned Judge to have come to the conclusion that the book was not in fact accessible to the public, and that no one really had seen it. If he was correct in coming to that conclusion the case presents no difficulty. The place where the French book was kept was not where the public could easily find it.

In the case before us the German specifications were in the very place where every one in search of them or in search of information on the subject to which they related would expect to find them, and to which he would go for information. It may well be that some person in this country may have seen these specifications and have obtained information from them which he is entitled to use; and in our opinion it would not be right to assume that there is no such person. No doubt the difference in the times during which the specifications were open to the public

(1) 31 Beav. 133.
(2) 1 Web. Pat. Cas. 718, n.
(3) 1 Web. Pat. Cas. 733.
(4) 21 Ch. D. 720.
(5) 31 Ch. D. 241.

makes a difference in the probability of knowledge being actually gained from them; but six weeks is quite long enough to enable people on the look out for information to acquire it, especially when they are told, as they were by the lists published in the *Journal*, that the specifications were in the Patent Office and could be seen there. We attach but little importance to the fact that the German specifications were not in the Patent Office at the time when the lists in the *Journal* were published. The specifications arrived shortly afterwards.

The conclusion at which we have arrived, and which, in our judgment, is most in accordance with the authorities and with the principles which underlie them, may be thus expressed. *Primâ facie*, a patentee is not the first inventor of his patented invention if it be proved that before the date of his patent an intelligible description of his invention, either in English or in any other language commonly known in this country, was known to exist in this country, either in the Patent Office or in any other library to which the public are admitted, and to which persons in search of information on the subject to which the patent relates would naturally go for information. But if, as in *Plimpton* v. *Malcolmson* (1) and *Plimpton* v. *Spiller* (2) and in *Otto* v. *Steel* (3), it be proved that the foreign publication, although in a public library, was not in fact known to be there, the unknown existence of the publication in this country is not fatal to the patent. In the present case the Plaintiffs cannot prove what under the admitted circumstances they must prove in order to sustain their patent. The decision appealed from was therefore right, and the appeal must be dismissed.

LOPES, L.J.:—

I have arrived at the same conclusion as the rest of the Court, but not by the same process of reasoning. I think the existence of these German specifications in the library of the Patent Office, where they were unreservedly accessible to every one, was in itself conclusive evidence of a prior publication. This special case has been stated by consent in order to obtain, as a question

(1) 3 Ch. D. 531. (2) 6 Ch. D. 412.
(3) 31 Ch. D. 241.

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of law, the opinion of the Court whether in the circumstances stated there has, or has not, been a prior publication in this country of the Plaintiffs' patent. The prior publications relied on by the Defendants are the German specifications mentioned in the special case. The special case finds that before the date of the Plaintiffs' patent there were on the shelves of the library at the Patent Office two copies of two German specifications, each of which, with the drawings annexed, contained a description of the Plaintiffs' patent: this is admitted. These specifications had been in the Patent Office for some time, but, in my opinion, proof of this is unnecessary. The Patent Office is open to the public, and any one of the public might have seen these specifications; whether they were proved to have done so or not in my opinion is immaterial.

The patentee must be the first and true inventor. If the invention has previously to the date of the plaintiff's patent been communicated to the public the patent is void. The patentee is not, then, the first and true inventor if his discovery has already been communicated to the public. He then adds nothing to the stock of human knowledge; he gives nothing to the public; what he purports to give they possessed before. Apply this to the present case. Can the Plaintiffs be said to have increased the stock of human knowledge, to have given the public any information which they did not previously possess, if at the time of filing the specification there existed in the library of the Patent Office, unreservedly open to the public, specifications describing in identical terms the same invention? The public were then possessed of the information contained in the Plaintiffs' patent, it was on the shelves of their public library—a library in the Patent Office—the place of all others devoted to information relating to inventions; the place to which any one wanting information on such subjects would resort. Why should the public be precluded from the right of using the information of which they were then in possession? I think that directly the German specifications were deposited in the library of the Patent Office and became unreservedly accessible to the public there was a complete publication of the invention in this country, and it became the property of the public. If this case had been tried

at Nisi Prius and the Defendant had given evidence of the deposit of these German specifications in the library of the Patent Office in the way mentioned in this case, I think the Judge should have at once told the jury that the evidence of prior publication, if they believed it, was conclusive, and that they must find accordingly. In my opinion the depositing the specifications in the library of the Patent Office in the way described was itself a publication of the invention contained in them, and I think that the invention was then dedicated to and became the property of the public. *Lang* v. *Gisborne* (1) is a strong authority in support of the conclusion at which I have arrived. Lord *Romilly* there says: "I am, however, of opinion that a publication takes place when the inventor of any new discovery, either by himself or by his agents, makes a written description of it and prints it in a book and sends it to a bookseller's to be published in this country. I am of opinion that it is not at all necessary to establish the fact that one volume of that book has been sold, for I think that as soon as an inventor informs the public of what his invention consists, and prints it in a book which he sends to a publisher to sell, from the moment that the book is exposed for sale in the bookseller's shop, there becomes, in point of law, a complete publication of the invention." The existence of these German specifications in the library of the Patent Office, unreservedly accessible to the public, is surely more cogent evidence of publication than the exposure for sale in a bookseller's shop, which Lord *Romilly* seems to have thought sufficient. Nor do I think that the judgment of Sir *George Jessel* in *Plimpton* v. *Malcolmson* (2) is inconsistent with the view I entertain. He says (3): "It does appear to me, sitting as a jury, that I should be wanting in common sense if I came to the conclusion that the existence of this book on the shelf in a private room in the Patent Library —private in the sense of not being accessible to the public, though public in the sense that if anybody had by accident known of it he could have sent for the book—would be such a publication as to deprive the man who first made it known to the world of that merit . . . which consists in making known a useful invention

(1) 31 Beav. 133, 135. (2) 3 Ch. D. 531.
(3) 3 Ch. D. 567.

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to the public." I am inclined to think if the book there in question had been deposited in the library of the Patent Office in the same open and unreserved way as the German specifications were, that Sir *G. Jessel* would have held its presence in the library of the Patent Office conclusive evidence of publication. In *Plimpton* v. *Spiller* (1) Lord Justice *James* says: "It is not necessary for us to lay down any new canon or rule as to what constitutes or does not constitute publication—as to how far a book in a public library may or may not be a publication; but I agree with the conclusion that the Master of the Rolls has arrived at in this case, that as a matter of fact it is impossible to say that this American book ever was in the library in any sense in which it could be construed to be accessible to the public. . . . It appears to me that the evidence is too slight to warrant any inference whatever that between the 20th of July and the 25th of August, 1865, that book which was sent over from *America* to this country was ever in such a position as to be, practically speaking, accessible to any part of the public." The above case is therefore very different from that with which the Court is now dealing. The book was not accessible to the public, and could not be said to have become part of the public stock of information.

In the *United Telephone Company* v. *Harrison* (2), in circumstances somewhat similar to those in this case, Mr. Justice *Fry* held there had been a prior publication. There was, however, evidence in that case that a Dr. *Muirhead* had consulted the *Zeitschrift*.

In *Otto* v. *Steel* (3) Mr. Justice *Pearson* held there had been no prior publication, but there the book in question was in the inner room of the *British Museum*, and could only be obtained by one of two means, either by some person knowing of the book and writing the name of the book on a piece of paper and requesting that the book might be furnished to him, or going to the superintendent and obtaining information from him which might lead to the discovery of the book. In these circumstances the book could not be said to be openly and unreservedly accessible to the public. *Otto* v. *Steel* is therefore distinguishable from the present case.

(1) 6 Ch. D. 429. (2) 21 Ch. D. 731. (3) 31 Ch. D. 241.

I find nothing in any of these cases opposed to the view that these specifications, when deposited in the library of the Patent Office in such a way as to become unreservedly accessible to the public, must be taken to be communicated to the public and to become part of their property. They are deposited in a place devoted to the subjects with which they deal; they are placed within the reach of every member of the public who desires to consult them. I am at a loss to understand how a patentee can be said to add anything to the common stock of public knowledge when the public at the date of his letters patent have in their public library, accessible to everyone, a detailed description of that for which he is seeking a monopoly. If a previous complete specification for the same invention is proved to have been enrolled in the Patent Office, that in itself, without any proof that any one had ever seen or heard of it, is conclusive evidence of prior publication. I presume on the ground that a document describing the invention has been filed in the Patent Office, a document accessible to all, and therefore the public could not be precluded from using information which they already possessed. In *Hindmarch* on Patents (1) it is said that "if the public once becomes possessed of an invention by any means whatever, no subsequent patent for it can be granted either to the true and first inventor himself, or any other person, for the public cannot be deprived of the right to use the invention, and a patentee of the invention could not give any consideration to the public for the grant, the public already possessing everything that he could give." This, in my opinion, is a correct statement of the law and applicable to this case. I do not attach any importance to the fact that the specifications were in the German language. I agree with what has been said by Lord Justice *Lindley* on this point. The appeal must be dismissed.

Solicitors: *Crowders & Vizard*, agents for *Owston, Dickinson, & Simpson, Leicester; Johnston, Harrison, & Powell*, agents for *R. & R. C. Winder, Bolton.*

(1) 1st Ed. (1846) 33.

M. W.

C. A.
1886
V.-C. B.
Nov. 2, 3, 4, 8.
C. A.
1887.
March 8.

HELMORE *v.* SMITH (1).

[1885 H. 4359.]

Partnership—"Chattel interest" of one partner—Execution by Sheriff—Dissolution—Purchase by another Partner—Undervalue—Setting aside Sale—Insanity of Partner.

During the temporary unsoundness of mind of the Plaintiff, who was a partner with the Defendant, the sheriff levied execution against his "chattel interest" in the partnership upon three judgments which had been obtained against him. At a sale by auction by the sheriff, the Defendant himself bought the interest for a sum very much below its actual value, and an assignment of the interest was executed by the sheriff to the Defendant. The purchase-money was paid to the sheriff by a cheque drawn by the Defendant on the partnership banking account, and the amount was debited to the Plaintiff in the partnership books.

The Plaintiff on recovering his health brought an action to set aside the sale on the ground of undervalue and undue advantage, for a declaration that the partnership was still subsisting, for a dissolution, and for the usual accounts:—

Held, that the purchase was void and must be set aside.

Held, also, that under the circumstances of the present case there was no dissolution of the partnership by the seizure and sale.

Whether a sale by the sheriff of a partner's interest to his co-partner causes a dissolution, if the co-partner purchases with his own money, *quære*.

A sheriff cannot sell a partner's interest in the goodwill or book debts, or anything else which he cannot seize.

THE Plaintiff and the Defendant had carried on business in co-partnership in *London*, as coal merchants, in the name of "*Helmore & Smith*," under articles of partnership dated in 1876, and a memorandum indorsed thereon and dated the 6th of September, 1881. By the provisions of the articles and memorandum the Plaintiff and Defendant agreed to continue to carry on the business as partners for five years from the 1st of April, 1881, and to stand possessed of the profits and assets in equal shares. The profits of the partnership up to and including the year 1881 averaged, as the Defendant admitted, between £1500 and £2000 a year.

The Plaintiff took an active part in the affairs of the partnership until December, 1881, when he became temporarily deranged

in mind, and he was for about four months from that date, until April, 1882, when he was discharged, under restraint as a patient in *Bethlehem Hospital*; but he was never found by inquisition to be of unsound mind. At the time the Plaintiff entered the hospital he was plaintiff in three actions then pending, but owing to his state of health further proceedings in the actions were abandoned and judgment was allowed to go against him by default. A sum of not more than £86 was required to satisfy the judgments.

On the 15th of March, 1882, the sheriff of *Middlesex* levied execution on the judgments upon the Plaintiff's "chattel interest" in the goodwill and effects of the partnership business, and on the 24th of March, the Plaintiff being still in hospital, put it up for sale by public auction, when it was knocked down to the Defendant for £125; and by a deed-poll dated the 30th of March, 1882, the sheriff assigned such chattel interest to the Defendant absolutely. The Defendant then changed the name of the firm from "*Helmore & Smith*" to "*Smith & Co.*, late *Helmore & Smith*," maintaining that the partnership had been dissolved, and that the Plaintiff had no further interest in it.

The Plaintiff, however, alleged that the sum of £125 was a totally inadequate price for his interest in the partnership; that it was, in fact, worth about £2500, irrespective of the goodwill; and that the Defendant had taken advantage of the Plaintiff's illness and absence to purchase the interest at an inadequate price and to secure it for his own benefit; and he contended that the purchase, except upon the footing of the Defendant being a trustee for the Plaintiff of the property purchased, was fraudulent and void.

As the Defendant still insisted that he was entitled by virtue of his purchase to the whole of the business for his own exclusive benefit, the Plaintiff brought this action claiming (1) a declaration that the purchase by the Defendant of the Plaintiff's share and interest in the partnership business was a purchase by him as trustee for the Plaintiff; or (in the alternative) a declaration that the purchase was fraudulent and void as against the Plaintiff and ought to be set aside, and the deed of the 30th March, 1882, delivered up to be cancelled; or a declaration that in any event

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the Plaintiff's share did not pass by the sale and assignment by the sheriff; (2) a declaration that, notwithstanding the said transaction, the Defendant remained and was a partner with the Plaintiff in the business, and a dissolution of the partnership as from the date of the writ; and the usual accounts and other relief incidental to a partnership action.

In his statement of defence the Defendant said he was a *bonâ fide* purchaser of the Plaintiff's interest at the sale by the sheriff, but he admitted that at the time of the sale the assets of the partnership were worth about £3800 and that the value of the Plaintiff's interest in the partnership was about £1344; and in his answer to interrogatories he deposed that on the day of the sale by the sheriff the book debts due to the firm amounted to £2599 9*s.* 5*d.*, the stock-in-trade was of the value of £963 17*s.* 4*d.*, including the stock of coals at the depôts of the firm, the amount standing to the credit of the firm at their bankers was £1499 19*s.* 2*d.*, and there was cash in hand about £15 or £20.

Issue having been joined the action now came on for trial.

In his evidence the Plaintiff stated that from the time he left the hospital in April, 1882, down to October, 1885, the Defendant paid him from £4 to £6 a week for the maintenance of himself and his family; that these sums were paid out of the profits of the business, the Defendant promising to render accounts and come to a settlement; but, on the other hand, the Defendant asserted that the payments were made solely out of kindness, and not as part of the profits. It appeared, however, from the voluminous correspondence which was put in, that the payments were made from time to time upon the footing and on the assumption that the Plaintiff was still a continuing partner.

The Defendant in his evidence admitted that the £125 was paid to the sheriff by a cheque drawn by the Defendant on the banking account of the partnership, and that the amount was debited to the Plaintiff in the partnership books.

The action came on for hearing before Vice-Chancellor *Bacon* on the 2nd of November, 1886.

Millar, Q.C., *Lockwood*, Q.C., and *Oswald*, for the Plaintiff:—

The main question is whether one partner can, under an exe-

cution and under such circumstances as the present, buy out another partner. It is no doubt a general rule of law that a judgment creditor of any partner may take in execution against that partner as well his separate property as his share or interest in all the personal property of the partnership that is tangible and capable of being seized: *Johnson* v. *Evans* (1); *Chapman* v. *Koops* (2); but, if a partner buys his partner's interest under the execution, the purchase can only be sustained where it has been made under circumstances above suspicion, and where there has been no concealment of facts, unfair dealing, or interference in the sale by the purchasing partner: *Perens* v. *Johnson* (3) and *Maddeford* v. *Austwick* (4). That is necessary on account of the fiduciary relation that subsists as between partners. Here, it is impossible that the purchase by the Defendant can be sustained, for, in the first place, the Plaintiff was unable to act for himself, and had no independent advice or assistance; and, secondly, the purchase-money was, upon the Defendant's own admission, much below the value of the Plaintiff's interest. Again, as the Defendant did not pay the purchase-money out of his own pocket, but out of the partnership funds, he cannot maintain that the property purchased belongs to him for his own sole benefit. We submit, therefore, that the partnership has not been dissolved by the Defendant's acts; that it is still subsisting, and that the accounts should be taken as in an ordinary action for dissolution. In any view the "chattel interest" only of the Plaintiff passed by the sale; his share of the goodwill of the book debts, which were only *choses in action*, did not pass, as they were not "tangible or capable of being seized."

Marten, Q.C., and *G. Henderson*, for the Defendant:—

Our purchase was made *bonâ fide*, and without any fraud or concealment. Our object was to get rid of the claims against the partnership property.

Upon a sale by the sheriff of the interest of one partner, there is nothing to prevent a purchase of that interest by his co-partners, provided they act with perfect fairness, and do nothing to

(1) 7 Man. & G. 240, 249.
(2) 3 Bos. & P. 289.
(3) 3 Sm. & Giff. 419.
(4) 1 Sim. 89.

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conceal the real value of the interest so as to enable themselves to buy it at an undervalue: *Lindley* on Partnership (1); and the authorities above cited shew that a *bonâ fide* purchase by one partner of another partner's share under an execution by the sheriff may be sustained. This partnership has, in point of fact, already been dissolved, for, in the absence of an express agreement to the contrary, a partnership is dissolved by one partner's share being taken in execution: *Lindley* on Partnership (2); *Aspinall* v. *London and North Western Railway Company* (3).

BACON, V.C.:—

I do not think I need call upon you, Mr. *Millar*, in reply. The case is a very curious one. The law of the Court upon the question involved in it is very important, and I will, therefore, proceed to examine it. It is said that taking in execution the interest of a partner *ipso facto* determines the partnership: that, because an execution of £5 or £20 or £50 is levied against a partner, his partner has a right to say, "The partnership is dissolved; I am to go on alone, and you are to be excluded." Such a result would be marvellous and irrational, and there is not a particle of authority to support any such contention; except that in Lord Justice *Lindley's* most valuable book—one of the most valuable contributions ever made by a learned writer to the law and practice of the Court—it is said that an execution against a partner's share dissolves the partnership; by which is only meant—as all the authorities shew—that it may have the effect of dissolving the partnership. It may be a ground, and one can suppose a great many cases in which it would be a just ground, for dissolving a partnership. To introduce the execution creditor as a partner would be monstrous, and to permit the partnership to go on under such circumstances might be injurious to everybody; it might be a case for applying to the only authority which exists in our law to have a declaration that the partnership is to come to an end, that it is to be dissolved; and thereupon the Court would not part with the case without directing all inquiries, accounts, and proceedings which would be necessary to

(1) 4th Ed. vol. i. p. 691. (2) 4th Ed. vol. i. p. 230.
(3) 11 Hare, 325.

do full justice to the parties. But there never was a case yet that I know of in which it was decided, nor has it been assumed and adopted in any text-book, that the mere execution against a partner's undivided share of the partnership dissolved the partnership contract. If that is so, the Defendant here has not a shadow of a case. I leave out of sight all that has been said about fiduciary relations for a moment. He has no case. [His Lordship then detailed the facts of the case down to the assignment by the sheriff to the Defendant, and proceeded:—] The Defendant's argument is that under that assignment he acquired a legal right to the share of his partner in this business; and that is the first and most important question I have to consider.

Now I feel surprised when I am told seriously that a partner can buy out his partner's interest, whether under execution or otherwise, with that partner's own money for his, the purchasing partner's, own benefit. The state of affairs appears plainly enough upon the records before and the evidence. At the time of the sale the book debts due to the partnership amounted to £2599 9*s.* 5*d.*, the amount at the banker's was £1499 19*s.* 2*d.*, the stock-in-trade was of the value of £963 17*s.* 4*d.*, and there was cash in hand about £15 or £20. That was the state of things: a good flourishing business carried on for many years in equal shares, and the assets consisting of the sums which I have mentioned. One of the partners goes to the auction at which his partner's interest was put up for sale and he there buys it. And how did he pay for it? By drawing out of the partnership account, as he himself says, this sum which he had agreed to pay. Whose money was it? He cannot say it is his own; one partner cannot say, "Money belonging to the partnership belongs to me." Here the Defendant could not even say, "Half of the partnership money is mine," because there had been no division; but out of the common stock, which can only by law be dealt with for partnership purposes, the Defendant buys the chattel interest put up for sale. Of course he could not prevent the sheriff from selling; he could not deal with the sheriff; he could only submit to the execution. But upon what principle of law can he go to the partnership money and pay out the sheriff with it and say, "Now I am entitled to all the interest which the sheriff had a

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right to sell," the sheriff having only a limited right to sell so much as would satisfy his execution? Nothing, in my opinion, is more clearly settled than that, except by the consent of the parties, there cannot be any dissolution of a partnership until it has been decreed by the Court. Death, no doubt, will dissolve a partnership, but, the parties being still alive, there may be cases in which a right to a dissolution may be so clear, patent, and uncontrovertible that the Court will unhesitatingly recognise it. I do not doubt there may be circumstances under which an execution against a partner might present such a case as that to the Court, but this partnership included the very considerable assets I have mentioned, and was a good going business. That the goodwill of it should be sold for about £100, and that it should be bought by a man and paid for out of the partnership money is another state of facts.

Cases, no doubt, have happened frequently where for the protection of one partner the Court has decreed a dissolution, and there is one that I am surprised neither side has noticed, though not for its direct application to this case. It is a case which was before Lord *Hatherley*, when Vice-Chancellor (1), and it is published anonymously for reasons which would occur to anybody on reading it. That was a case in which one partner had become of unsound mind and had been driven to the painful circumstance of attempting to commit suicide. He recovered, and filed a bill to have the partnership accounts taken. There was a cross bill filed by the other partner, and the matter seems to have been discussed with all the gravity and seriousness that such a case well deserved, and I can hardly think of a more serious case. Lord *Hatherley* took great pains in reviewing the state of the law at that time, and he said in plain terms that neither the attempt at suicide nor the conduct of the partner sufficed in itself to dissolve the partnership. On the other hand, the partner himself who had been unfortunate in his own insanity did not have it all his own way, but the Court considered, on the facts then appearing, that the partnership must be dissolved and that it must be dissolved upon the regular and proper terms, the proper accounts being taken; that it was a continuing partnership until it was

(1) *Anon.*, 2 K. & J. 441.

dissolved, and then it must be dissolved because there were good grounds for the Court, in the exercise of its equitable authority, declaring that the contract between the partners had come to an end by force of circumstances.

Then the period at which a dissolution ought to take place has to be considered. In another case which it has not been thought necessary to mention, *Besch* v. *Frolich* (1), there was an insane partner, and the dissolution was decreed; and the question was from what period the dissolution should take place—whether it should be from the filing of the bill or from the date of the decree. It was decided by Lord Chancellor *Cottenham* that it should be dissolved as from the date of the decree. Upon this particular point the law is not in question. There was nothing to prevent the Defendant in this case from bringing his action if he thought that the temporary insanity of his partner justified him in asking the Court to put an end to the partnership, which I must consider to have been a lucrative partnership. There was no difficulty. If he was displeased or disquieted or alarmed at the possibility of having a partner who was subject to fits of insanity, and subject to the attacks of creditors which might come in a roundabout way against the partnership property, there was nothing to prevent him bringing his action. He took no such step. On the contrary, although there is no direct evidence on the subject, he must be a careless observer of human events who does not see very plainly that all the Defendant did was to protect the partnership property, to prevent any more executions against the partnership property, to get it away out of the clutches of the creditors, and that, as a consequence of that, he altered the name of the firm from "*Helmore & Smith*" to "*Smith & Co.*" That is the real history of the case; and I believe that at that time Mr. *Smith*, the Defendant, had no more idea of making these partnership assets his own than I have at this moment of becoming a coal merchant. That appears to me to be quite enough to dispose of this case. I think, upon the Defendant's own shewing, there is a clear right on the part of the Plaintiff to have the partnership declared dissolved from the date of the judgment. It would expire by the terms of the

(1) 1 Ph. 172.

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agreement on the 1st of April, 1886; still it has been carried on since; there is no longer a question as to that. It will be declared dissolved as from the date of the judgment, and the usual accounts must be taken.

But, of course, I cannot leave the case there after the length of time that has been occupied in discussion. It has been urged on behalf of the Defendant that the facts of the case are not sufficient to establish a fiduciary relation between the parties.

If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on. I want no written declaration of trust; I do not want any particular promise: but here I find that the Defendant, having with the Plaintiff's own money bought what he calls the Plaintiff's interest in the partnership, carries on the business, and that during the period that he carries it on, he makes him (he says out of mere benevolence) weekly payments for the maintenance of himself and his family. The Defendant takes credit for it as if it was an act of eleemosynary alms bestowed by him. There is not the slightest reason to induce me to believe there was any such intention. The evidence and the correspondence satisfy me that there was a constant recognition by the Defendant of the fact that it was his duty to provide this maintenance to the Plaintiff; that he never at any time said "All that is earned by the business belongs to me and you have no claim upon it." I cannot draw any other conclusion from the evidence than that the Defendant himself assumed that the fund out of which he made the payments belonged to the partnership.

In my opinion the Plaintiff is entitled to the ordinary partnership account; to a declaration that the assignment which was made by the sheriff is inoperative and ought to be set aside; also to a declaration that, notwithstanding the purchase, the Defendant remained a partner with the Plaintiff; also to a declaration that, as from the date of the judgment, the partnership is dissolved; and the ordinary partnership accounts must be taken. The Plaintiff is entitled to the costs of the action.

G. I. F. C.

From this judgment the Defendant appealed. The appeal was heard on the 8th of March, 1887.

Rigby, Q.C., and *G. Henderson*, for the Appellant :—

The seizure and sale by the sheriff of the Plaintiff's interest in the partnership chattels operated as a dissolution of the partnership. There would be no doubt about that if the purchase had been by a stranger: *Skipp* v. *Harwood* (1); *Aspinall* v. *London and North Western Railway Company* (2); *Habershon* v. *Blurton* (3). On what principle can it be held that a purchase by a member of the firm does not have the same effect provided he buys in open market and without fraud? He takes his title from the sheriff, and cannot be in a worse position than a stranger. It is said that the Defendant in the present case paid the purchase-money out of the partnership assets: but he believed it was his own money; he meant to buy the share for himself and to pay for it out of his own money.

Millar, Q.C., *Oswald*, and *Emanuel*, for the Plaintiff, were not called on.

COTTON, L.J. :—

This is an appeal from a judgment of Vice-Chancellor *Bacon*. The Plaintiff and the Defendant were carrying on business in partnership together, when unfortunate circumstances connected with the health of the Plaintiff necessitated his being under confinement for a time. He seems to have brought various actions, which were not prosecuted by him, and the defendants in these actions obtained judgment against him for the costs of these actions. On these judgments the defendants issued writs of execution; the writs were placed in the hands of the sheriff, and the sheriff seized chattels belonging to the partnership. That being so, the Defendant bought from the sheriff the interest of the Plaintiff in a great deal more than the chattels seized, for he bought the share and interest of the Plaintiff in the partnership; and this was assigned to him as well as the interest of the

(1) 2 Swans. 586, n. (2) 11 Hare, 325.
(3) 1 De G. & Sm. 121.

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Plaintiff in the chattels which were seized. Now I do not think that it would be right in this case—certainly not without hearing further argument—to lay down general principles or rules as to the rights of the solvent partner, or as to the right of a stranger purchasing from the sheriff under such circumstances. To my mind, the case is to be decided against the Defendant on the ground that he did not buy these goods with his own money. I will assume—and it is only assuming, for we have not heard the Plaintiff here—that the Defendant, when he paid for what he bought from the sheriff, thought he would become entitled to the whole of the partnership property, including the balance at the bankers: but in fact he paid the purchase-money out of the banking account of the partnership: therefore, notwithstanding the seizure by the sheriff, the Plaintiff would be entitled to have an account. The Defendant bought with part of the partnership property, subject to such rights of account as there might be between the Plaintiff and the Defendant; and, in my opinion, that being so, he cannot insist that he bought for himself so as to prevent the Plaintiff from being considered as still a partner in the business, on the ground that the purchase from the sheriff was of that which the sheriff had a right to seize. It was said that the Defendant intended to buy for himself, and that he thought what he was paying was his own money. I will assume that he did: but he did not do so under any mistake of fact. He knew this was a partnership banking account: and the mere fact that an opinion was entertained by him (if it was) that the assignment by the sheriff had given him a right to consider this banking account as his own, will not make the money his if in fact it was not. The mere mistake in law will not excuse or alter the effect of what he has done. Undoubtedly, if there is a seizure of partnership effects by the sheriff under an execution against one of the partners, and a purchase by a stranger, that is a dissolution of the partnership. I give no opinion as to what would have been the result if the co-partner, the Defendant, had in fact bought with his own money; but, as a fact, that which he took was not his own money but the money of himself and his partner, subject to the partnership account. In my opinion it would be wrong to say that by the seizure and the purchase by him, he had

made himself owner of the Defendant's interest in the partnership, so that after that time he could carry on this business, treating himself as solely and absolutely entitled to the partnership business. The account must be taken, and in the account the sum paid will have to be charged to the Plaintiff. That is a very different thing from the contention urged by Mr. *Rigby*, that from the time of the sale by the sheriff and purchase by the Defendant, the Defendant was the sole owner of the business, subject to any rights of taking the accounts which the Plaintiff might have. In my opinion, although it would be right to correct the mere date in the Vice-Chancellor's judgment by saying that the dissolution and end of the partnership took place on the 1st of April, 1886, according to the provision in the articles, that is no material alteration. The decree of the Vice-Chancellor must be affirmed, and the appeal must be dismissed, with costs.

LINDLEY, L.J.:—

I am of the same opinion. In giving my reasons I may say that the subject involved is one which I have frequently studied for more than twenty years: and I know the difficulties surrounding it. But in this case no difficulty arises. A writ of *fi. fa.* was issued against one of two partners in the business of coal merchants. Let us consider what the sheriff could do under that *fi. fa.* He could seize all such of the assets of the firm as are seizable under a *fi. fa.*, but he could not seize book debts or goodwill. The *fi. fa.* does not touch such things; and it is a mistake, and a very serious mistake, to suppose that when the sheriff, under a separate execution against one of several partners, seizes the partnership goods, and sells the share and interest of the execution debtor in those goods, the sheriff can or does in practice sell the whole of the execution debtor's interest in the partnership. Such a case is conceivable, but in practice it never arises, because there are always in practice assets which cannot be reached by a *fi. fa.* What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a *fi. fa.* The unfortunate purchaser from the sheriff has to find out what he

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has really had assigned to him, and that he can only do by a partnership account; there is no other method of proceeding. That does involve practically a dissolution of the whole concern. Now, what makes this particular case easy is this: when the sheriff sold under the *fi. fa.* he sold to the continuing partner, the solvent partner, who did not pay the purchase-money to the sheriff out of his own money, but paid for what he purchased out of the assets of the partnership. In point of law, the necessary result of buying this share with the funds of the concern is, that there was no dissolution at all. The purchase was made on behalf of the firm, and the Vice-Chancellor was quite right in treating such a seizure and such a sale as not amounting to a dissolution. We must correct the date, as suggested by *Cotton*, L.J., but the appeal ought to be dismissed with costs.

LOPES, L.J.:—

If the Defendant in this case had bought from the sheriff what he did buy with his own money very difficult questions would have arisen, which would have required time and consideration to determine. But it is clear in this case that the Defendant did not buy with his own money, but with partnership assets. Under these circumstances he cannot, in my opinion, successfully contend that he bought for himself, nor can he contend that he is entitled to exclude the Defendant from the benefit of the purchase made with money belonging to the partnership. I think the Vice-Chancellor was right in holding in this particular case that there was no dissolution.

Solicitors for Plaintiff: *Joel Emanuel & Co.*
Solicitor for Defendant: *R. Furber.*

M. W.

HELMORE *v.* SMITH (2).

C. A.
1886
KAY, J.
Nov. 26.
C. A.
1886
Nov. 29, 30;
Dec. 1.

[1885 H. 4359.]

Practice—Attachment—Contempt of Court—Interference with Receiver and Manager of Business—Circular containing Libel on Business.

A libel on the business carried on by a receiver and manager appointed by the Court is a contempt of Court, and may be punished by committal of the offender.

After the Court had made an order appointing a receiver and manager of a business a former clerk of the firm sent round a circular to the customers of the firm containing an unfair statement of the effect of the order, and soliciting their custom for his own business. As he declined to give an undertaking not to repeat the offence, the Judge committed him to prison for contempt of Court, and the committal was upheld by the Court of Appeal.

THIS was a motion to commit *Henry William Helmore* for contempt in interfering with the receiver and manager appointed by the Court in the discharge of his duties.

Frederick Helmore, the father of *H. W. Helmore*, and *Charles Smith* for some years carried on the business of coal merchants in *Piccadilly*, under the firm of *Helmore & Smith*. In March, 1882, *C. Smith* purchased the share of the business of his partner, who was at that time in confinement for temporary derangement of mind, and continued to carry on the business under the style of *Charles Smith & Co.* In November, 1885, *F. Helmore* brought the present action against *Smith*, asking that the purchase might be set aside on the ground of undervalue, that the partnership might be declared to be still subsisting, and for a dissolution, and the usual accounts.

On the 8th of November, 1886, Vice-Chancellor *Bacon* gave judgment in favour of the Plaintiff, deciding that the purchase of March, 1882, was void; that the partnership between the Plaintiff and Defendant was subsisting at the time when the action was brought; and ordering that the partnership should be dissolved and the partnership accounts taken. And his Lordship directed a reference to chambers to appoint a receiver of the partnership assets This hearing and the appeal from it are reported (1).

(1) *Ante*, p. 436.

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The Defendant gave notice of appeal from this judgment, and applied to the Judge to stay the execution of the judgment pending the appeal. This application having been brought before the Court of Appeal, the Court, in order that the business might be kept together until the appeal could be heard, made an order dated the 17th of November, 1886, appointing the Defendant *C. Smith* to receive and get in the debts and assets of the partnership, and to manage the business, he giving an undertaking to manage the same in the ordinary way as it had been previously carried on, and to give satisfactory security as such receiver.

H. W. Helmore had been a clerk in the employment of the firm of *Helmore & Smith*, and afterwards of *C. Smith & Co.*, until October, 1885, when he was dismissed by *C. Smith*. He then set up in business as a coal merchant on his own account in *Buckingham Palace Road*, and at once sent out circulars to the customers of the firm, stating that in consequence of his dismissal by *C. Smith* he had started in business on his own account, and soliciting their custom. No steps were taken by the Defendant to restrain the issuing of this circular.

On the 18th of November, 1886, *H. W. Helmore* sent out to the customers of the firm the following circular, which constituted the alleged contempt of Court:—

"*Helmore* v. *Smith*.

"Sir,—I beg to enclose you report of the above case from the *Times* of Nov. 9, 1886. The Defendant, *Charles Smith*, is appealing from such judgment, and pending the hearing of such appeal has been appointed receiver on giving adequate security.

"As your esteemed orders have for the most part come under my personal supervision while manager to the firms of *Helmore & Smith* and *Charles Smith & Co.*, I beg to submit to your notice my present prices, and to inform you that should you favour me with any orders they will receive the same attention and care as formerly.

"Thanking you in anticipation, I am yours obediently,

"*Henry W. Helmore.*"

Inclosed was a reprint of the report in the *Times* of the hearing of the case before the Vice-Chancellor.

It appeared from the evidence that *H. W. Helmore* had taken the names of the customers of the firm from a list which had been entrusted to him while in the employment of the firm to be used in their service, and which he had kept on leaving their employment.

The Plaintiff, as well as his son, deposed that the Plaintiff had no knowledge of the issuing of this circular.

The Defendant now moved to commit *H. W. Helmore* for contempt of Court in issuing the circular and thus interfering with the receiver and manager appointed by the Court. The motion was heard before Mr. Justice *Kay* on the 26th of November, 1886.

Marten, Q.C., and *G. Henderson*, for the motion.

Millar, Q.C., and *Emanuel*, for *H. W. Helmore*.

KAY, J. (after stating the facts, and reading the circular, continued):—

No one could fail to understand that the object of the Court of Appeal in making the order of the 17th of November was to keep the business as a going concern in the hands of the manager appointed by the Court until the appeal should be determined; but the circular omits to state that the Defendant had been appointed manager. The Defendant was to undertake the management of the business at once, and was to give security forthwith. What *Helmore* says to the customers in this circular is virtually this: "The business is at an end, subject to the chance of an appeal from the Vice-Chancellor's judgment; send your orders to me." Any one receiving that circular with the *Times* report, would understand that the business had come to an end, subject to the result of an appeal, and that there was no *interim* carrying-on of the business at all. In my opinion the circular was an improper interference by *Helmore* with the receiver and manager: and his taking the names of the customers from the list at the office at which he was a clerk was also an improper act. I suggested that he should give an undertaking to abstain from issuing circulars calculated to draw off the customers of the firm. That he refuses. He says: "I will undertake not to send out circulars omitting to state that

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Charles Smith is manager as well as receiver." That is not enough. I order him to be committed to prison, but give him three days before the order is enforced, to see whether he will give an undertaking in the terms of the notice of motion.

G. I. F. C.

C. A.

From this order *H. W. Helmore* appealed. The appeal came on for hearing on the 29th of November, 1886.

Millar, Q.C. and *Oswald* (*Emanuel* with them), for the Appellant:—

The Appellant has done nothing which can be construed into a contempt of Court. There has been no personal interference with the receiver nor with any property to which he is entitled, Unless there is such interference the Court never exercises its extraordinary power of committal: *Broad* v. *Wickham* (1); *Lane* v. *Sterne* (2); *Ward* v. *Swift* (3).

The circular soliciting customers was only a fair competition with the receiver in the ordinary course of business. The statement of facts contained in it was a fair one, or if there was anything inaccurate, so as to amount to a slander of title, the receiver has his remedy by civil action; it is not a proper case for imprisonment, which might ruin a young man just commencing business. The conduct of the Appellant is censured for making use of a list of his former employers' customers. But he was under no contract not to solicit their customers, and in the absence of such a contract there is nothing illegal or immoral in a servant setting up business in competition with his former employers and soliciting their customers: *Patterson* v. *Gas Light and Coke Company* (4); *Pearson* v. *Pearson* (5).

Marten, Q.C., and *G. Henderson*, for the Defendant:—

If there is no reported case like this, the Court ought to make a precedent, for the Appellant has been guilty of a gross contempt of Court. The object of the Court in appointing

(1) 4 Sim. 511.
(2) 3 Giff. 629.
(3) 6 Hare, 312.
(4) 2 Ch. D. 812.
(5) 27 Ch. D. 145.

Smith manager as well as receiver was to keep up the business without change till the hearing of the appeal, that it might be sold, if sold at all, as a going concern. The Appellant has done what he can to frustrate that object. It is both an interference with the manager and an injury to the property under the management of the Court. The conduct of the Appellant has been culpable in surreptitiously keeping and using a list of the customers of the firm which was entrusted to him to be used in their service; and he has also in the circular misrepresented the facts of the case. Any person reading it would understand that the receiver was appointed to wind up the business and not to manage it. It is a slander of title which might be stayed by injunction, and when directed against a business being managed by an officer of the Court ought to be punished as a contempt. The Appellant had the opportunity of giving an undertaking not to repeat the offence, but he refused to give it.

Millar, in reply.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Kay*, made on the application of the Defendant, for the committal of the son of the Plaintiff to prison for contempt of Court in interfering with the receiver and manager appointed by the Court. The action was brought to set aside the purchase by the Defendant of the Plaintiff's share of the business which they had been carrying on in partnership. Vice-Chancellor *Bacon* declared that the purchase was invalid, and that the partnership was still subsisting at the commencement of the action, and he ordered a dissolution of the partnership and the appointment of a receiver. The Defendant appealed against this judgment, and made an application to this Court to stay proceedings in the action until the hearing of the appeal. On the hearing of that application we considered it desirable for the Defendant, and also for the benefit of the Plaintiff, that the business should be kept alive as a going concern until the appeal could be heard. It seemed to be better for all parties that if the business was sold it should be sold as a going concern. Therefore we made an order that, on the under-

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taking of the Defendant to manage the business in the ordinary way, and to give satisfactory security, he should be manager of the business till the hearing of the appeal. On the day after that order was made the son of the Plaintiff, who had taken an active part both in the business and in the dispute between his father and the Defendant, sent round this circular to all the customers of the firm, with the report from the *Times* of the judgment of the Vice-Chancellor. [His Lordship read the circular set forth above.] It appeared from the evidence that when *H. W. Helmore* left the employment of the firm he secretly carried away with him a list of their customers, which had been given him to be used in their service, to enable him to solicit orders for himself. My decision does not turn on this fact, but it must not be supposed that I do not strongly disapprove of such conduct. It was said that there was a general custom among persons engaged in the coal trade to act in this manner. If that be so, all I can say is that the sooner they act as honourable men the better. But I do not rest my decision on that point. Mr. Justice *Kay* considered that the act of the Appellant in sending round the circular was a contempt of Court, as an interference with the receiver and manager appointed by the Court. It is true that the exact case is a novel one. Counsel on neither side have been able to discover a case at all like it in its facts. In all the cases reported on the subject of committal there has been either some personal interference with the receiver, or with his reception of some definite debt or thing which, as receiver, he was entitled to receive; and it was argued in this case that the goodwill of a business was not a definite, tangible thing which the receiver could sue for, and that all that the Appellant had done was done in fair competition. If it had been fair competition, that argument would have had to be dealt with. But in my opinion this was not a case of fair competition. No fair competition would justify the act of the Appellant in sending round a copy of the report in the *Times*, which, if taken alone, would lead the customers to think that the business was in a failing state or would shortly fail. This would be the effect produced by the circular on the mind of any reasonable man. But he also added in the circular that *Smith* had appealed, and that

he had been appointed receiver pending the appeal. That was not a true representation. The fact was not that Mr. Justice *Kay* had appointed *Smith* receiver, but that the Court of Appeal had determined that it was best that *Smith* should manage the business, on its old lines, so as to keep it alive till it had been decided whether the judgment of the Vice-Chancellor was correct. I must come to the conclusion that the Appellant knew all these circumstances, and was aware of the fact that *Smith* was to act as manager of the business, and that the issue of the circular was not an act of fair trade competition, but was done for the purpose of producing a false impression. The circular was in fact a libel on the business which this Court had directed the Defendant to manage, and in my opinion, though the case is a new one, amounted to a contempt of Court. It was said that the order of Mr. Justice *Kay* was harsh, and would ruin the Appellant, who was a young man just commencing business. If Mr. Justice *Kay* had sent him to prison without giving him the opportunity of doing anything else, it might have been open to that observation, but the Judge had given him the opportunity of undertaking not to send any more circulars to customers of the firm. If the Appellant had simply acted under an error of judgment, I do not understand why he did not give the undertaking proposed. As he refused to do so, I think the order for committal was quite right, and the appeal must be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. This is an appeal from an order for the committal of the Appellant for contempt of Court on the ground of an alleged interference with the receiver and manager appointed by the Court. The object of the discipline enforced by the Court in case of contempt of Court is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice. The question, therefore, here is whether there has been an interference with the administration of justice. On the 17th of November, the Defendant *Smith* was appointed receiver and manager of the business, and on the following day the circular

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was sent out. It was argued that this is a novel case, and that in all the reported cases of committal for interference with a receiver there has been some personal interference or an interference with the receipt of some definite, tangible thing, and that the sending out of this circular was merely such competition as the business would have been liable to experience in ordinary course; and it is contended that the business when under the management of a receiver and manager was no more entitled to protection from such fair competition than the business carried on by the original firm. If the acts complained of merely amounted to such fair competition, the argument would be unanswerable. But when I examine the facts, I come to a different conclusion. The Appellant had been in the employment of this firm. He then became, in the course of his employment, entrusted with certain information, namely, the names of the customers of the firm, which was reduced to a list for the purpose of collection. This list he carried away with him as if it had been his own property. The question we have to decide does not turn on that act, but as it has been suggested to the Court that this act was justifiable, I think it right to say, lest it should be thought that the Judges countenanced such acts, that it must not be assumed that such conduct was honest or legal; nor could I sit by and allow it to go forth to the world that I countenance the doctrine that the confidential information received by a servant to advance his master's business may be used afterwards by him to advance his own business to the injury of his master's interests. It is part of the implied contract between the master and the servant that such confidential information is not to be used to the master's disadvantage.

But I pass to that about which there can be no question, namely, the intent and meaning of this circular. It can only mean one thing, that the business carried on by the firm was in troubled waters, that its management was in a disturbed condition through the appointment of a receiver, and that there was a good opportunity for some one outside the firm to step in and catch its falling trade. That was, in fact, a libel on the business, a libel tending to prejudice the management of the business under the order of this Court. If there had been any doubt or

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question as to the meaning of the circular, it might be proper to leave the parties to another remedy, so that it might be submitted to a jury, who might take a different view of the meaning of the document: but there is no question as to that, and it is a clear wrong done to the owners of the business, and calculated to injure the property under the management of the Court. I will not discuss the cases as to what interference with a receiver and manager will justify the Court in interfering, or lay down any rule upon the subject. All I say is, that this was a wrongful act calculated to destroy property under the management of this Court, and that it was done deliberately. Are the hands of the Court so tied that it cannot protect its officers, and must relegate them to the ordinary legal remedy, and the consequent delay of execution? Where it is necessary for the protection of its officers or of the property itself the Court must shew that it has a long arm. In the present case, considering the wilfulness and persistence of the Appellant, I think it is a case in which the Court ought to interfere, and I concur in dismissing the appeal.

Solicitors: *Joel Emanuel & Co.; R. Furber.*

M. W.

In re HUME (A PERSON OF UNSOUND MIND).

C. A. 1887 *March* 28.

Practice—New Trustees—Verification of Consent of Trustee to act—Rules of Supreme Court, December, 1885, *Order* XXXVIII., *r.* 19 *a.*

Where a new trustee is appointed in Chancery as well as in Lunacy, his siguature to his consent to act may be verified in manner provided by Order XXXVIII., rule 19 *a*, and need not be verified by affidavit according to the old practice. *Secus*, where the order is made in Lunacy only.

In re Wilson (1) explained.

GEORGE BROUGHTON HUME and *H. S. Hume* were the trustees of the will of *George Dandridge* and of a settlement made by *George Dandridge*. *George Broughton Hume* and *G. W. Hume* were trustees of the will of Sir *Trevor Wheler*. The same persons were beneficially entitled under the three instruments.

(1) 31 Ch. D. 522.

C. A. 1887 *In re* HUME (A PERSON OF UNSOUND MIND).

George Broughton Hume was of unsound mind, though not found so by inquisition, and the other two *Humes* wished to retire. The persons beneficially interested presented a petition in Lunacy and Chancery asking that two persons named in the petition might be appointed trustees of all three instruments in the place of the existing trustees, and for the requisite orders vesting the trust estates in the new trustees.

Onslow, for the Petitioners:—

The consent of the new trustees to act is verified in manner provided by General Order XXXVIII., rule 19 *a* (December, 1885). It was held in *In re Wilson* (1) that, in Lunacy proceedings, the old practice must be followed, but the rule has since been held to be applicable where the petition is in Chancery as well as in Lunacy.

Leeke, for the retiring Trustees.

COTTON, L.J.:—

I think that the consent is sufficiently verified. The verification would not be sufficient if the petition were in Lunacy only, since the General Orders do not apply to Lunacy proceedings; but where the order is made in Chancery as well as in Lunacy I think the Chancery rule may be followed.

LINDLEY, L.J.:—

I am of the same opinion. I think that *In re Wilson* must have been decided under the impression that the petition was in Lunacy only.

LOPES, L.J., concurred.

Solicitors: *Bell, Stewards, & May.*

(1) 31 Ch. D. 522.

H. C. J.

C. A.
1887
March 30.

ELLIS *v.* STEWART.

[1885 E. 101.]

Practice—Security for Costs of Appeal—Delay.

Order for security for costs made although the appeal was in that day's paper for hearing, there having been no delay in making the application except a slight delay which was attributable to the Appellant.

ON the 17th of March the Plaintiff served notice of appeal from an interlocutory order made by *Kay*, J., in this action on the 24th of February. On the 18th of March the solicitors of the infant Defendant wrote to the Plaintiff's *London* agents asking whether the Plaintiff would give security for costs without an application to the Court. The agent said he must consult the country solicitor, and the solicitors of the infant said they would wait till the 21st before giving notice. Having received no answer, they on the 24th served notice of motion for Wednesday the 30th for security for costs. The adult Defendants had on the 21st of March served a similar notice of motion for the 24th.

The appeal motion and the applications for security came into the paper on the 30th of March.

H. Terrell, for one application, and *Beaumont* for the other, contended that the evidence shewed the insolvency of the Appellant, and that as the Applicants had been guilty of no delay they ought not to be precluded from security because the appeal had come into the paper with such unexpected rapidity.

Oswald, for the Plaintiff:—

This motion is out of time: *Mayor of Saltash* v. *Goodman* (1). The Applicants might easily have given notice of their applications in time for them to be in the paper on last Wednesday, the 23rd. The evidence of insolvency is insufficient.

COTTON, L.J.:—

It is the duty of a respondent who applies for security for costs to be prompt in his application, that the Appellant may not go

(1) 43 L. T. (N.S.) 464.

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on incurring expenses which in the event of his being ordered to give security for costs and being unable to find it will be wholly thrown away. In the present case, however, there has been no delay which has not been sufficiently explained. An application was made at once to the Appellant to know whether he would give security for costs, and the delay was occasioned by waiting for his answer. The evidence of inability to pay costs is amply sufficient, and security must be given before the appeal can be heard.

LINDLEY, L.J., concurred.

Solicitor for Appellant: *A. W. Mills*, agents for *T. A. Bramsdon, Portsea.*

Solicitors for Respondents: *Indermaur & Brown*, agents for *Palmer & Rockett, Southsea; Chamberlayne & Beaumont*, agents for *Hyde, Portsmouth.*

H. C. J.

C. A. 1886 KAY, J. *Nov.* 9. C. A. 1887 *April* 20.

BISCOE *v.* JACKSON.

[1872 B. 265.]

Charity—Mortmain—Cy-près—General Charitable Intention—Failure of particular Object—Bequest to establish Soup Kitchen and Cottage Hospital.

A testator directed his trustees to set apart a sum of money out of such part of his personal estate as might by law be applied for charitable purposes, and to apply it in the establishment of a soup kitchen and cottage hospital for the parish of *S.* in such manner as not to violate the *Mortmain Acts.*

A suit having been instituted to administer the trusts of the will, the Chief Clerk reported that it was impossible to apply the fund in accordance with the directions in the will:—

Held, that the will shewed a general charitable intention to benefit the poor of the parish of *S.*, and that although the particular purpose of the bequest had failed, the Court would execute the trust *cy-près*; and a scheme was directed accordingly.

JOSEPH JACKSON, of *High Street, Shoreditch*, made his will, dated the 27th of March, 1871, and thereby gave and bequeathed to *T. Biscoe* and *W. Brown* the lease of his business premises in

Shoreditch, together with the goodwill of the business and all his stock-in-trade, book debts, and the balance of any moneys which might remain in the hands of his bankers at the time of his death, after payment of certain legacies therein mentioned, upon trust to continue the business for three years, and to accumulate the profits by way of compound interest; and subject to the directions aforesaid he directed that the trustees should sell and convert into money the lease, goodwill, and stock-in-trade and other effects, and should get in the outstanding debts, and out of such part of the moneys which should arise from such sale and conversion and the accumulation of profits aforesaid as should be pure personal estate and might by law be bequeathed for charitable purposes, he directed his trustees to set aside the sum of £10,000; and as to £4000 part thereof to apply the whole of such sum of £4000, or such part thereof as his said trustees or trustee should in their or his absolute discretion think fit, and the annual income of such part of the said sum of £4000 as should not for the time being be so applied, and which he authorized his said trustees or trustee to invest in the modes of investment thereinafter authorized, in the establishment of a soup kitchen for the parish of *Shoreditch*, and of a cottage hospital adjoining thereto, in such manner as not to violate the *Mortmain Acts*; such hospital to be provided with not less than four beds for patients whose case should be of an urgent character, and with all other necessary furniture and appliances; and as to £6000, the residue of the said sum of £10,000, and any portion of the said sum of £4000 that might not be required for the purposes aforesaid, he directed his trustees to invest the same and to stand possessed thereof and of the investments for the time being representing the same, upon trust out of the annual income thereof to pay a woman who should reside at the hospital 15*s.* weekly to attend upon the patients, and to pay a sum of £60 a year to a surgeon for such hospital, and to apply the residue of such annual income towards the necessities of the said hospital and for the benefit thereof and of the patients who should from time to time be taken into such hospital in such manner as his trustees or trustee should in their or his absolute discretion think fit. The testator also gave legacies to the *Shoreditch*

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Almshouses, the *Blind School*, in *Commercial Street, Shoreditch*, and to some other charitable purposes not connected with the parish of *Shoreditch*. He made no gift of his residuary estate.

The testator died on the 8th of July, 1871, and the present suit was instituted by the executors and trustees against the next of kin and the Attorney-General for the administration of the estate, and a decree was made on the 23rd of November, 1872.

On the 2nd of June, 1881, when the suit came on for further consideration, Vice-Chancellor *Hall* decided that the bequest for the establishment of a soup kitchen and cottage hospital was a good charitable bequest and was not void under the *Mortmain Act*, and ordered the legacy with its accumulations, which then amounted to £12,734 Consols, to be brought into Court to the account of "The Soup Kitchen and Hospital Account." He also directed an inquiry whether the fund could be applied for the establishment of such soup kitchen and cottage hospital in accordance with the directions in the will.

On the 4th of June, 1886, the Chief Clerk made his certificate, and upon evidence that no land already in mortmain could be obtained within the parish of *Shoreditch*, though every effort had been made for the purpose, found that the fund in Court could not, nor could any part thereof be applied for the establishment of such soup kitchen and cottage hospital, and for the benefit of such hospital in accordance with the directions in the will.

The Attorney-General, on the 9th of August, 1886, took out a summons before Mr. Justice *Kay* to vary the certificate, but his Lordship refused to vary it.

On the 9th of November, 1886, the next of kin applied by summons for the payment out to them of the fund in Court, on the ground that the bequest being for a special charitable object which could not be carried out, had failed.

W. Pearson, Q.C., and *Cecil Russell*, in support of the summons:—

There is no general intention shewn in the will of the testator to benefit the poor of *Shoreditch*; and this is the case of a legacy given for a specific purpose which cannot be carried out and has failed, and accordingly the fund set apart to answer it goes to

the next of kin: *Martin* v. *Margham* (1); *Attorney-General* v. *Bishop of Oxford* (2); *Clark* v. *Taylor* (3). Locality runs throughout the whole of this gift, and no land can be obtained within the parish: *Attorney-General* v. *Whitchurch* (4).

[KAY, J., referred to *Loscombe* v. *Wintringham* (5).]

Sir *R. Webster*, A.G., *Macnaghten*, Q.C., and *Ingle Joyce*, for the Crown, were not called upon.

Edwin Ward, and *F. E. Ward*, for the executors and trustees of the will.

KAY, J.:—

I confess that I think this can be supported as a general gift to charity. The testator begins his bequest by stating that the £10,000 is to be set apart out of such part of his "pure personal estate" as "may by law be bequeathed for charitable purposes." [His Lordship then read the whole of the gift, and continued:—] Now, obviously, on the face of that gift, the persons intended to be benefited are the persons in the parish of *Shoreditch* who would usually resort to a soup kitchen and cottage hospital. Who are they? Certainly the poor; and it is clear he means the poor of the parish of *Shoreditch*; therefore an intention to benefit that class of persons by providing them with a soup kitchen and a cottage hospital may be treated as the paramount intention of this testator. He has directed his trustees to set this money apart, and then he directs them, no doubt, how they are to apply this money. I quite agree that if the mode of application is such an essential part of the gift that you cannot distinguish any general purpose of charity, but are obliged to say that that mode of doing a charitable act was the only one the testator intended, or at all contemplated, and that he had no general intention of giving his money to charity, then the Court cannot, if the particular mode of doing it fails, apply the money *cy-près*.

On the other hand, if you do see a general intention of benefiting a certain class or number of people, who come within the

(1) 14 Sim. 230.
(2) 1 Bro. C. C. 444, n.
(3) 1 Drew. 642.
(4) 3 Ves. 141.
(5) 13 Beav. 87.

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ordinary definition of objects of charity, and you find that the particular mode the testator has contemplated of doing this cannot be carried out, and you are convinced that the mode is not so essential that you cannot separate the intention of charity from that particular mode, then the Court says there is a general intention of charity, and as the mode has failed, the duty of the Court is, favouring charity as the Court always does, to provide another mode than that which the testator has pointed out, and which has failed.

I will take two of the leading cases on this subject, and take from the language in the first case of Sir *Richard Pepper Arden*, the Master of the Rolls, his definition of the mode in which, or the cases in which, that doctrine of *cy-près* is to be applied. It is much more satisfactory to deal with a statement of the principle on which the Court acts, of such antiquity as this which I am going to read, and by so great an authority, than to take a particular case, the circumstances of which differ, and say that case binds me about the particular will I have to construe. The words of Sir *Richard Pepper Arden* are these, I am reading from *Attorney-General* v. *Boultbee* (1): "As to the doctrine of *cy-près*, as applied to charities, this sensible distinction has prevailed: the Court will not decree execution of a trust to a charity in a manner different from that intended, except so far as they see that the intention cannot be executed literally; but another mode may be adopted consistent with his general intention, so as to execute it, though not in mode, in substance. If the mode becomes by subsequent circumstances impossible, the general object is not to be defeated, if it can be attained." Lord *Eldon* in *Mills* v. *Farmer* (2) says, "I consider it now established, that although the mode, in which a legacy is to take effect, is in many cases with regard to an individual legatee considered as of the substance of the legacy, where a legacy is given so as to denote, that charity is the legatee, the Court does not hold, that the mode is of the substance of the legacy; but will effectuate the gift to charity, as the substance; providing a mode for that legatee to take, which is not provided for any other legatee."

It seems to me these two *dicta* apply very closely indeed to the

(1) 2 Ves. 380, 387. (2) 19 Ves. 483, 486.

case before me; and I will only add to them one more, which I think was that of either Lord *Langdale* or Lord *Cottenham* in the case of *Cherry* v. *Mott* (1), where he, after referring to those cases amongst others, says (2): "In this case, however, there is no gift, except in the direction to do that which cannot be effected. It is not within the principle of those cases in which the Court executes a general purpose *cy-près*, the particular mode being impossible." That was a case where the testator desired that the money arising from his residuary personal estate should be applied in carrying out a contract with the governors of *Christ's Hospital* for the purchase of a presentation of a boy to that charity, which particular object had entirely failed.

Now I think I do see here that there was a general intention to benefit the poor of the parish of *Shoreditch*; and to benefit them in the first place, if it could be done, by establishing a cottage hospital and a soup kitchen. But if the particular mode which the testator has very carefully directed for doing that has failed—as I assume for the purpose of this argument it has failed—and it is found that it cannot be carried out by reason that there is no land in mortmain in or sufficiently near to the parish of *Shoreditch* upon which a building can be erected for either of these purposes, does it follow that I am to say that this gift has completely failed, and the property belongs to the next of kin? I think not. I think I see here a sufficient general intention to benefit the poor of *Shoreditch* to entitle me to direct a scheme for that purpose, if that were all. But also I am not satisfied that, because land cannot be found to build a cottage hospital or soup kitchen upon it, there may not be other modes of establishing a cottage hospital or soup kitchen within the parish of *Shoreditch*, which may carry out the testator's intention. I have no evidence before me at this moment on the subject. I cannot feel satisfied that because a soup kitchen or cottage hospital cannot be built, that therefore there may not be other modes of providing soup and medical attendance for the poor of *Shoreditch* without a building of either kind. What has been attempted, as I understand, up to this time, has been to find land on which there could be a building erected. That attempt has failed. It seems to

(1) 1 My. & Cr. 123. (2) 1 My. & Cr. 133.

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me that my duty is, treating that attempt as having failed, which I am bound to do on this argument, to declare that there is a sufficient general intention of charity for the benefit of the poor of *Shoreditch* to entitle the Court to execute this trust *cy-près*, and to direct a scheme for that purpose to be settled.

Sir *R. Webster*, A.-G. :—As that is the result, and we can get that order made on this summons, we shall not ask for costs against the next of kin.

KAY, J. :—The costs of all parties then will be out of the fund, those of the Attorney-General and the trustees as between solicitor and client.

W. W. K.

The Attorney-General appealed from the order of the 9th of August, 1886, by which Mr. Justice *Kay* refused to vary the Chief Clerk's certificate. And the next of kin appealed from the order of the 9th of November, 1886, directing a scheme for the application of the legacy *cy-près*. The appeals were heard on the 20th of April, 1887.

Sir *R. Webster*, A.-G., and *Ingle Joyce*, in support of the first appeal :—

The evidence before the Chief Clerk only went to prove that no land already in mortmain could be found within the parish of *Shoreditch*. But that is not necessary ; it is sufficient to satisfy the words of the bequest if land can be found within a convenient distance. There can be very little doubt that such land could be found, if further inquiries were made. But if the decision of the Judge on the 9th of November, 1886, is upheld, we do not wish to press our appeal ; for the Crown will be satisfied if the charitable gift is carried into effect *cy-près*.

W. Pearson, Q.C., and *Cecil Russell* for the next of kin, the Appellants in the second appeal :—

This is not a case in which the charitable gift can be carried into effect *cy-près*. There is no general dedication of the fund to charity, but only a desire to found a particular institution.

We must assume on this appeal that it has been found impossible to carry that desire into effect. Therefore the gift fails, and the fund belongs to the next of kin. In the case of *Attorney-General* v. *Ironmongers' Company* (1), where a gift for the redemption of British slaves in *Barbary* was applied *cy-près*, the capital of the fund was dedicated to charity, and a portion of the income only given to that particular purpose. In *Chamberlayne* v. *Brockett* (2) there was also a clear dedication to charity. But here the whole fund is given for the particular purpose which has failed, and there is no intimation of any general charitable intention. The doctrine of *cy-près* is only applied where the particular object becomes impracticable after the testator's death; but here it has never been practicable at all: *Clark* v. *Taylor* (3); *In re Ovey* (4); *Fisk* v. *Attorney-General* (5); *Cherry* v. *Mott* (6).

[FRY, L.J., referred to *Attorney-General* v. *Pye* (7).]

Sir *R. Webster*, A.-G., and *Ingle Joyce*, for the Crown, were not called on.

Edwin Ward, and *F. E. Ward*, for the executors and trustees of the will.

COTTON, L.J.:—

This is an appeal from an order made in November by Mr. Justice *Kay*, which directed a reference to settle a scheme to apply a sum of £10,000. For the purpose of this appeal we must assume that the bequest contained in the will could not be carried into effect in accordance with the particular directions contained in the will as was found by the certificate. That certificate was excepted to, and Mr. Justice *Kay* disallowed the exception. For the present purpose the Attorney-General does not press his appeal against the decision of Mr. Justice *Kay*. The real question, therefore, is whether or not the Court can, in a legacy like this, apply the doctrine of *cy-près*? It is clear that when there is a legacy given to a particular legatee, and that

(1) Cr. & Ph. 208.
(2) Law Rep. 8 Ch. 206.
(3) 1 Drew. 642.
(4) 29 Ch. D. 560.
(5) Law Rep. 4 Eq. 521.
(6) 1 My. & Cr. 123.
(7) 1 Atk. 435.

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legatee fails before the death of the testator—there being only the gift to the particular legatee, even though that legatee is an institution—the legacy fails. But the question which we have now to consider is this, is this to be considered as a legacy to a particular institution which cannot be carried into effect, or do we see here an expressed intention by the testator to benefit the poor of the parish of *Shoreditch*, pointing out a particular mode in which he desires that benefit to be effected? For if the latter be the true view, then if that particular mode cannot have effect given to it, the Court will take hold of the charitable intention to benefit the poor of the parish and will apply the legacy in the best way *cy-près* for their benefit.

Now, in my opinion, notwithstanding the argument which has been addressed to us, I think there is that general intention. It is very true that the testator leaves certain things to be done by the trustees to whom he is giving the sum of £10,000, and if that is to be considered as a gift to an existing institution, or as a gift for that purpose only, it has failed. But then, in my opinion, looking at this whole clause, we see an intention on the part of the testator to give £10,000 to the sick and poor of the parish of *Shoreditch*, pointing out how he desires that to be applied; and that particular mode having failed, as we must for the purposes of this appeal assume to be the case, then the intention to benefit the poor of *Shoreditch*, being a good charitable object, will have effect given to it according to the general principle laid down long ago by this Court, by applying it *cy-près*. If the will had said that the trustees must build the particular building within the parish of *Shoreditch* there might be some difficulty, but what the testator desires to do is to provide a particular kind of hospital and a soup kitchen for the poor of the parish of *Shoreditch*. To my mind that shews that he intends not that it is to be located in a particular place, though that would be a proper mode of giving effect to the particular directions contained, if a place in the parish could be found; but that it is for the benefit of the parish, that is of the poor in the parish of *Shoreditch*. The testator directs that this shall be done by providing them with soup in this kitchen, by providing them with relief in a cottage hospital, and then by a direction that there is to be a woman living

in the hospital to look after the inmates in the hospital, and that a sum of money is to be paid to a medical man to attend to them; and then he directs his trustees "to apply the residue of such annual income towards the necessities and for the benefit thereof, and of the patients who shall from time to time be taken into such hospital in such manner in all respects as my trustees or trustee in their or his absolute discretion think fit." Of course we have to determine what is the effect, looking fairly at the words used by the testator, to see what his intention was. To my mind the clear result is that he intended here to provide for the benefit of the poor, which is a good charitable bequest, and to provide for that primarily in the particular way he points out. If that fails then the doctrine applies, and Mr. Justice *Kay* was right in directing a reference to ascertain what was the best means for giving effect to his intentions, having regard to what the testator has said in the will as to the particular mode in which he desires his intentions should have effect given to them. In my opinion this appeal must fail; and that being our decision the other appeal is of course abandoned by the Attorney-General.

LINDLEY, L.J.:—

I am of the same opinion. I do not think the matter is really open to much difficulty. It has been found, rightly or wrongly, that this £10,000 cannot be applied for the establishment of such soup kitchen and cottage hospital, and for the benefit of such hospital as will be in accordance with the directions of the will. I am not at all satisfied that that is right; if it is, it must be simply because no place can be found in the parish for establishing this soup kitchen and hospital. It is perfectly conceivable that that finding may not be right, but we must assume it to be right. What is the consequence of that? It seems to me to be perfectly obvious that what the testator really was aiming at was to provide food and medical attendance for the poor of the parish to the extent of his ability as measured by his bequest of £10,000. There is no particular direction as to where the kitchen and hospital are to be, nor as to whether it is to be in the parish or out of the parish. It is to be for the benefit of the parish, and to liken this to a bequest to a particular institution, or to such a

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case as *Cherry* v. *Mott* (1), where the bequest was to buy a presentation for a boy in a particular school, is to compare this case to those which are obviously dissimilar from it. Other cases are much closer to it. If we were considering the question now for the first time the result might be different, but the whole doctrine is perfectly well settled. The object here is to establish a charity for the benefit of the poor with a particular mode of doing it; and if you cannot accomplish the object in that mode, then in some other mode in which you can. It appears to me that to give the next of kin this £10,000 would be quite contrary to the authorities.

Lord Justice *Fry* wishes me to say that he agrees in the judgment and the result.

Solicitors: *Pattison, Wigg, & Co.; Hare & Co.; Angell, Imbert-Terry, & Page.*

M. W.

C. A. 1887 May 2.

In re HARWOOD (A PERSON OF UNSOUND MIND).

Lunatic Mortgagee—Power of Sale—Lunacy Regulation Act, 1853, *ss.* 116, 136 [*Revised Ed. Statutes, vol. xi. pp.* 684, 690]—*Vesting Order.*

The Master in Lunacy having reported that it was desirable that property of which the lunatic was mortgagee should be sold under a power of sale in the mortgage, the Court declined to make an order authorizing the committee to sell and to convey the estate to the purchaser, but only directed him to sell, leaving the transfer of the legal estate to be dealt with on a subsequent application under the *Trustee Act*, 1850.

THE lunatic was mortgagee by demise of a leasehold property for £500. The deed contained a power of sale: "It is hereby declared that the mortgagee may at any time or times after the said 9th day of June next, without any consent on the part of the mortgagor, sell the said premises or any part thereof either together or in parcels," &c., with a stipulation that the power should not be exercised unless default was made in payment after such notice as therein mentioned, or until the whole or part of some half-yearly payment of interest should be in arrear for three

(1) 1 My. & Cr. 123.

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calendar months. The interest being seriously in arrear the committee of the estate took out a summons for leave to put up the property for sale, and convey it when sold to the purchaser.

The Master certified that it was desirable that the property should be sold, "but, having regard to the doubts which have been expressed before me as to whether such sale of the said mortgaged premises can be duly carried into effect under the provisions of the 136th section of the *Lunacy Regulation Act*, 1853, in conjunction with the 3rd section of the *Trustee Act*, 1850, or whether such sale can be so effected under one or other of such sections alone, and which of them, or in what other mode such sale should be made, and the requisite conveyance or assignment to a purchaser executed, I humbly submit the matter to the consideration of your Lordship."

The certificate came before one of the Lords Justices who adjourned it into Court.

H. McNab Humphry, for the committee:—

The question is whether the order should go on to direct the committee to convey to the purchaser. The practice has been merely to direct him to sell, and when the sale has been effected to apply for a vesting order under the *Trustee Act*, 1850, sect. 3. I submit that the sale may be carried out under the *Lunacy Regulation Act*, 1853 (16 & 17 Vict. c. 70), s. 136, without any reference to the *Trustee Act*. That section enables the Lord Chancellor to authorize the committee to exercise any power vested in a lunatic for his own benefit. He can therefore be authorized to exercise this power of sale in the mortgage deed, and to give full effect to the exercise of it by conveying the estate, which will save the expense and delay of a further application.

COTTON, L.J.:—

The question is whether, where a lunatic is mortgagee with a power of sale, the committee can be authorized by one order not only to sell but to convey the estate to the purchaser. It is contended that an order to this effect can be made under sect. 136. This contention turns on the equivocal meaning of the word "power." The question is as to transferring the legal estate to a

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purchaser. As regards the legal estate the mortgage deed does not contain any power within the meaning of sect. 136. What is called a power of sale in a mortgage is nothing but an authority to defeat the equity of redemption, and when the mortgagee sells he transfers the legal estate not by means of a power but by virtue of his legal ownership. There may be a question whether such an order as is asked for could not be made under sect. 116, but I think that it would be dangerous to rely on that section as authorizing in a case like the present a new form of order on a sale under a power of sale in a mortgage, dispensing with a subsequent application under the *Trustee Act*, 1850. Whether the order could not be made under that section may be doubtful, but I have no doubt that it cannot be made under sect. 136.

LINDLEY, L.J. :—

I agree. It is best to keep on the safe side, and follow the present practice, which no doubt was adopted because it was felt to be doubtful whether a conveyance of the legal estate could be made without a subsequent order under the *Trustee Act*.

Solicitors: *Torr, Janeways, & Co.*

H. C. J.

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In re DOUGLAS. OBERT *v.* BARROW.

[1885 D. 1336.]

Charity—Mortmain—Indefinite Gift—Inclusion of Objects which are not charitable—Society for the Benefit of Animals.

A testatrix gave legacies to several charities and societies, among others to the *Society for the Protection of Animals liable to Vivisection* and the *Home for Lost Dogs*. And she directed her trustees to pay and distribute the residue of that portion of her personal estate which might by law be appropriated by will for such purpose among such charities, societies, and institutions (including or excluding those thereinbefore mentioned as might be preferred), and in such shares and proportions as Lord *S.* should by writing nominate.

Lord *S.* survived the testatrix and divided the pure residuary personal estate among a number of charities, not including the two above-mentioned

societies for the benefit of animals. The next of kin claimed the fund on the ground that the gift was void for uncertainty and for including objects which were not charitable :—

Held (affirming the decision of *Kay*, J.), first, that the scope of the will shewed that the testatrix referred only to charitable societies and institutions.

Secondly, assuming that the two societies for the benefit of animals were not charities, the fact that Lord *S.* had power to include them in the distribution of the fund did not make the bequest void.

But *semble*, the *Society for the Protection of Animals liable to Vivisection* and the *Home for Lost Dogs*, were charities within the statute 43 Eliz. c. 4.

Quære, whether the *Society for the Total Suppression of Vivisection* is a charity within the same statute.

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ELIZABETH DOUGLAS, by her will, dated the 22nd of November, 1882, appointed the Plaintiffs executors and trustees thereof. She devised all her real estates to the Defendant *Francis Barrow*, and gave certain specific and pecuniary legacies, and bequeathed all the residue of her personal estate, including leasehold property, to the Plaintiffs upon trust to sell and convert the same into money, and out of the proceeds to pay her debts, funeral and testamentary expenses and the pecuniary legacies, duty, and other bequests thereinbefore mentioned, and also a certain annuity: and she then proceeded as follows:—

"And upon further trust to pay to the Earl of *Shaftesbury* if he survives me and undertakes the nomination of the recipients of that portion of my residuary personal estate hereinafter mentioned to be subject to such nomination, the sum of £500 for the trouble he will have in so doing. And I direct that for the payment of the before mentioned pecuniary legacies and the moneys necessary for the purposes of the said annuity recourse shall be had in the first instance to such part of my personal estate not specifically bequeathed as cannot lawfully be appropriated by will to the charitable bequests I have hereinafter made. And upon further trust out of such part of my said personal estate as the law permits to be appropriated by will to charitable purposes to pay the following legacies to the treasurers or other proper officers of the respective charities, institutions, and societies hereinafter mentioned (whose respective receipts shall be effectual discharges for the same), and to be applicable for the general purposes of such respective charities, institutions, and

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societies." The testatrix then gave legacies to numerous societies and institutions, among others to the *Home for Lost Dogs*, the *Metropolitan and City Police Orphanage*, the *Police Fund for Officers of Police who have lost their Health and have been obliged to retire from the Service*, the *Royal Society for the Prevention of Cruelty to Animals*, and the *Society for the Protection of Animals liable to Vivisection*. She then proceeded as follows: "And upon further trust to pay and distribute all the residue of that portion of my said personal estate which may by law be appropriated by will for such purpose among such charities, societies, and institutions (including or excluding those hereinbefore mentioned as may be preferred), and in such shares and proportions as the said Earl of *Shaftesbury* shall by writing nominate, or in case the said Earl of *Shaftesbury* shall die before me or shall refuse or shall for a period of six calendar months after my death neglect to make such nominations or nomination, or in case he shall make any such nominations or nomination, and such nominations or nomination shall not exhaust the money available for the purpose of this present trust, and the said Earl of *Shaftesbury* shall refuse or shall neglect for the period aforesaid to make or shall die without making any further nominations or nomination, then amongst such charities, societies, and institutions (including or excluding those hereinbefore mentioned as may be preferred) as my said trustees or trustee in their or his sole uncontrolled and absolute discretion shall determine, and in such shares and proportions as they or he may think fit." And then the testatrix gave such part of the residue of her personal estate as could not lawfully be appropriated for charitable purposes to *Madeline Vibrack* for her separate use.

The testatrix died on the 28th of April, 1885. She had considerable personal property both pure and impure.

The Earl of *Shaftesbury* survived the testatrix, and on the 23rd of July, 1885, made his nomination in writing. He named 153 charitable societies and institutions, in which he did not include the *Home for Lost Dogs*, or the *Society for the Protection of Animals liable to Vivisection*, and divided the residue of the pure personalty of the testatrix's estate into 50,000 shares, and divided the sums among the various charitable societies and

institutions in unequal proportions. The present action having been brought for the administration of the estate, judgment was given on the 27th of June, 1885, ordering accounts and inquiries, and directing that the personal estate should be applied in a due cause of administration.

When the cause came on for further consideration the question was raised by the Defendant, who was the sole next of kin of the testatrix, whether the gift to such charities, societies, and institutions as the Earl of *Shaftesbury* should nominate was not void for uncertainty and indefiniteness.

It appeared from the evidence that in the year 1875 a society was formed called the "*Society for Protection of Animals liable to Vivisection*," but that in August, 1878, the title of the society was changed to the "*Society for the Protection of Animals from Vivisection*," and that in April, 1883, the society became united with the "*International Society for the Total Suppression of Vivisection*." The name of the testatrix appeared in the list of the members of the society until her death.

The further consideration was heard before Mr. Justice *Kay* on the 4th of August, 1886.

Kekewich, Q.C., and *E. Ford*, for the Plaintiffs.

Hastings, Q.C., and *Maidlow*, for the Defendant:—

The words "societies and institutions" must be taken to mean something different from "charities," with which they are coupled; and the expression "charities, societies, and institutions" includes friendly societies and other societies and institutions, which are not charities at all. Among the institutions which the testatrix has herself named is the *Home for Lost Dogs*, which, though an institution of a humane character, is a commercial undertaking, and cannot properly be described as a charity. The Court will not frame schemes for the disposal of money for any other than charitable purposes, and moneys not bequeathed in charity must have some definite object, or will devolve as undisposed of. Accordingly in this case, as the gift is not to charities exclusively or to any definite objects, it is, notwithstanding the discretionary power of nomination which

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accompanies it, void for uncertainty, and the personal estate comprised in it goes to the next of kin: *In re Jarman's Estate* (1); *James* v. *Allen* (2); *Millar* v. *Rowan* (3); *Baker* v. *Sutton* (4); *Ellis* v. *Selby* (5); *Williams* v. *Kershaw* (6); *Kendall* v. *Granger* (7); *Jemmit* v. *Verril* (8); *Nash* v. *Morley* (9); *Jarman* on Wills (10); *University of London* v. *Yarrow* (11).

Sir *Horace Davey*, S.-G., and *Ingle Joyce*, for the Attorney-General:—

The authorities cited on behalf of the next of kin are all of them cases in which some such indefinite expression as "charitable or benevolent purposes" has been made use of in the gift. In this case the context of the will shews plainly that the testatrix only meant to include such institutions and societies as could be legally described as charities, for she has expressly directed that this gift is to be satisfied out of such portion of her personal estate as may by law be appropriated for charitable purposes. The *Home for Lost Dogs* is a charity within the principle of the decision in *University of London* v. *Yarrow*. Upon the true construction of the will this residue is given to such charities, charitable societies, and charitable institutions as the Earl of *Shaftesbury* has nominated: *Wilkinson* v. *Lindgren* (12); *Townsend* v. *Carus* (13); *Morice* v. *Bishop of Durham* (14); *In re Sutton* (15); *Jarman* on Wills.

B. Eyre, for the *Middlesex Hospital*.

Cust, for the executors of the Earl of *Shaftesbury*.

Hastings, in reply.

(1) 8 Ch. D. 584.
(2) 3 Mer. 17.
(3) 5 Cl. & F. 99.
(4) 1 Keen, 224.
(5) 7 Sim. 352; 1 My. & Cr. 286–292.
(6) 5 Cl. & F. 111, n.
(7) 5 Beav. 300.
(8) Amb. 585, n.; also cited 1 My. & Cr. 292.
(9) 5 Beav. 177.
(10) 4th Ed. vol. i. p. 214.
(11) 1 De G. & J. 72.
(12) Law Rep. 5 Ch. 570.
(13) 3 Hare, 257.
(14) 9 Ves. 399; 10 Ibid. 522.
(15) 28 Ch. D. 464.

KAY, J.:—

In this case the Court must first determine the true construction of this will, and then, if necessary, apply the rules of law to it. Now the clause which is to be construed is one in which the testatrix gives a portion of her personal estate "among such charities, societies, and institutions, including or excluding those hereinbefore mentioned, as may be preferred, and in such shares and proportions as the Earl of *Shaftesbury* may appoint." *Primâ facie* the meaning of charities, societies, and institutions would seem to be charities, and then societies and institutions which might or might not be charities; because the will does not say charitable societies and institutions, but "charities, societies, and institutions." Every one knows there are many societies and institutions which are not, properly speaking, charities; which are societies and institutions for purposes other than those which the law considers charitable. But of course I must look to the context of this will, and the immediate context is this: "And upon further trust to pay and distribute all the residue of that portion of my said personal estate which may by law be appropriated by will for charitable purposes." The expression "residue of my said personal estate" naturally throws you back to the previous part of the will, in which I find the estate with which the testatrix is immediately dealing described thus:—"And upon further trust out of such part of my said personal estate as the law permits to be appropriated by me to charitable purposes" to pay certain legacies. And then, reading continuously on: "And upon further trust to pay and distribute all the residue of that portion of my said personal estate which may by law be appropriated by will for such purpose." Accordingly I must read those last words as though they were in the form of the first part of the gift I have just been reading, and then it would be thus: "And upon further trust to pay and distribute all the residue of that portion of my said personal estate which may by law be appropriated by will for charitable purposes." I read it so. Surely that throws some light on the words "among such charities, societies, and institutions." That which was in the testatrix's mind at the moment that sentence was being penned (assuming, as I must, that she drew it herself) was charitable

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purposes. Therefore when she uses the words "charities, societies, and institutions," *primâ facie*, seeing that she is dealing with personal estate which she has described as "such part of her personal estate as may by law be appropriated to charitable purposes," there is very considerable reason for supposing that the societies and the institutions to which she referred are to be charitable societies and charitable institutions, notwithstanding that the word "charities" is associated with them. But I look a little further into the matter, to see whether there is not a reason for that association.

Now going back to the first part of this charitable gift the words are "upon further trust out of such part of my personal estate as the law permits to be appropriated by will to charitable purposes, to pay the following legacies to the treasurers or other proper officers respectively of the respective charities, institutions or societies hereinafter mentioned"—there is the very same collocation of words except that you have got a disjunctive "or" instead of "and"—"whose respective receipts shall be effectual discharges for the same, and to be applicable for the general purposes of such respective charities, institutions, and societies, namely"—She then goes on to enumerate a number, of which I will take a few instances: the *Royal Society for the Prevention of Cruelty to Animals*, a society; the *Society for the Protection of Animals liable to Vivisection*, a society; the *Metropolitan and City Police Orphanage*, that is properly speaking an institution; "*The Police Fund for Officers of Police who have lost their Health and have been obliged to retire from the Service*," that is neither a society nor an institution, but properly speaking rather a charity. So that the words were used throughout as describing three different kinds of things—Charities, properly so called to which you could not apply the word "society" or "institution," Societies and institutions, both of which are at the same time charitable. I do not agree with the argument that amongst these particular legacies there are mentioned societies or institutions which are not properly speaking charitable. I think there are none such. Reliance is placed upon this, "*To the Home for Lost Dogs*, £100." It seems to me that all the reasoning in the case of the *University of London* v. *Yarrow* (1) applies distinctly

(1) 1 De G. & J. 72.

to shew that that is a charity. It is quite true that attending a sick canary, or sick dog, or sick animal, may not be itself within the meaning of charity, but when an institution is referred to which is for the benefit of domestic animals, that is so far a benefit to the human species who are served by the domestic animal, that the institution itself may well be treated as a charity, as an institution founded for the charitable purpose of assisting those animals which are useful to mankind, and which are commonly called domestic animals. And of all animals useful to mankind, and of all animals domesticated, and of all animals to which people have a strong attachment, I am sure one need not have lived long in the world to know that dogs hold the foremost place. I have not the least doubt that that is, strictly speaking, a charitable institution just as much as a hospital for "quadrupeds or birds useful to man" was, in the *University of London* v. *Yarrow* (1).

Therefore, I find the testatrix has used and twice used in the part of the will which immediately precedes this gift, the words "charities, institutions, and societies," or "charities, institutions, or societies," as meaning and referring to charities, charitable institutions, and charitable societies. When she has given me that glossary of her own meaning of the words, and when I couple with that the fact that she is dealing expressly with that part of her property which she says may by law be appropriated to charitable purposes—can I reasonably doubt that the meaning of the words she has used in this will is, that the charities, societies, and institutions amongst which the Earl of *Shaftesbury* was to make this appointment are all to be of a charitable nature? I confess I do not doubt that. I have come very clearly to that conclusion. It seems to me that whatever the meaning of the words "charities, societies, and institutions," might be, if they stood alone, the meaning of those words in this will and with the context which I have referred to, is "charities, and charitable societies, and charitable institutions." The other point, whether, in case the "societies and institutions" were not charities—a gift to charities, societies, and institutions, would not be too vague, it is not now necessary for me to decide, and I do not deal with it.

(1) 1 De G. & J. 72.

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From this judgment the next of kin appealed. The appeal came on for hearing on the 2nd of May, 1887.

Sir *H. James*, Q.C., *Hastings*, Q.C., and *Maidlow*, for the Appellant:—

There is nothing in this will to confine the Earl of *Shaftesbury's* power of appointment to objects which are in the legal point of view charitable. If he can appoint to objects not charitable, the gift is void: *Morice* v. *Bishop of Durham* (1); *Kendall* v. *Granger* (2); *In re Jarman's Estate* (3); *Ellis* v. *Selby* (4); *Williams* v. *Kershaw* (5).

[BOWEN, L.J., referred to *In re Sutton* (6).]

That case turned on the conjunctive "charitable and deserving." Here we have an alternative. There is nothing in the will to prevent the Earl of *Shaftesbury* from appointing to a benevolent institution which is not charitable, for the societies to which an appointment is expressly authorized, are not all charitable. The *Home for Lost Dogs* might probably be held charitable on the ground of *University of London* v. *Yarrow* (7). But we say that the *Society for the Suppression of Vivisection* is not charitable. Its object now is the total prohibition of vivisection. It may seem at first sight to be on the same footing as a society for the prevention of cruelty to animals, which would in all probability be held charitable, but there is in fact an essential difference. Cruelty is the wanton infliction of suffering, and to discourage cruelty is for the good of mankind, but infliction of severe pain on animals is not necessarily cruelty: *Lewis* v. *Fermor* (8). Vivisection is at present forbidden under severe penalties, except under the conditions of 39 & 40 Vict. c. 77, and for the purpose of discovering what will be useful for saving or prolonging life or alleviating suffering. There is no charity in prohibiting vivisection for the purposes and under the safeguards of the Act. There is then express power given to appoint to an object not charitable. It is true that the society is mentioned in the will by the

(1) 10 Ves. 522.
(2) 5 Beav. 300.
(3) 8 Ch. D. 584.
(4) 1 My. & Cr. 286.
(5) 5 Cl. & F. 111, n.
(6) 28 Ch. D. 464.
(7) 23 Beav. 159; 1 De G. & J. 72.
(8) 18 Q. B. D. 532.

name which it bore when its objects were more limited, but it had existed with the same name and objects as now for four years before the will was made. To support the judgment of Mr. Justice *Kay*, it is necessary either to leave out words of the will or to import the word "charitable." The provision as to pure personalty is not enough to alter the construction, it was natural to insert it as most of the objects mentioned are charitable.

Sir *R. Webster*, A.-G., and *Ingle Joyce* (Sir *H. Davey*, Q.C., with them), for the Attorney-General:—

The whole frame of the will shews that the testatrix contemplated charitable objects only in this bequest. She specially appropriates to them such parts as might lawfully be given to such objects. The words ought to be read as if they were "charities, charitable institutions and charitable societies," and no institution or society can take the benefit of the gift unless it is charitable within the statute of *Elizabeth*: *Morice* v. *Bishop of Durham* (1). There is therefore nothing indefinite in the gift.

With respect to the two societies for the benefit of animals which were specially named by the testatrix, and which the Earl of *Shaftesbury* had power to include, we say in the first place that they are both charitable objects within the statute of *Elizabeth*. They are within the principle of *University of London* v. *Yarrow* (2). In *Marsh* v. *Means* (3) an opinion was expressed that the prevention of cruelty to animals was a good charitable purpose.

[COTTON, L.J.:—The testatrix mentions the "*Society for the Protection of Animals liable to Vivisection.*" I am inclined to think that that object was a charitable one; but the society afterwards changed its name and object, and is now a society for the abolition of vivisection.]

That is equally a charitable object. But even if that society is not a charitable society, that fact will not invalidate the gift of the residue. There is no evidence that testatrix knew of the change of name, and she gave the legacy to the society under

(1) 10 Ves. 522, 540. (2) 1 De G. & J. 72.
(3) 3 Jur. (N.S.) 790.

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the belief that it was a charitable society. If she was wrong in that view, her mistake, or the mistake of the Earl of *Shaftesbury* if he had included it, would make no difference in the effect of the general charitable gift: *Jarman* on Wills (1); *Attorney-General* v. *Doyley* (2).

E. Ford, for the trustees.

Lyttelton Chubb, for other parties.

Hastings, in reply, referred to *Carne* v. *Long* (3); *In re Dutton* (4); *Thrupp* v. *Collett* (5); *Habershon* v. *Vardon* (6); *Browne* v. *Yeale* (7); *Attorney-General* v. *Stepney* (8).

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay* which has been very fully argued, and involves a point of interest and also, I believe, the right to a large sum of money. However we must consider it on the strict law as settled by the decisions of this Court.

The question is this—whether the residue of that portion of the testatrix's estate which could be applied for charitable purposes goes to the next of kin, the Appellant, or whether it is to be applied according to the discretion given by the testatrix to the Earl of *Shaftesbury,* who survived her and exercised that discretion. It is contended here, on behalf of the Appellant, in accordance with the well-established doctrine of the Court, that there is no trust of this particular residue which can be executed by this Court. It is contended that the purposes are so indefinite, that the Earl of *Shaftesbury,* not being restricted to the application of this fund to charitable purposes, that is to say, to purposes which this Court considers charitable—the whole gift fails; on the principle laid down in *Morice* v. *Bishop of Durham* (9), that where there is a gift without any definite object pointed out, but merely a description of the character of the object to

(1) 4th Ed. vol. i. p. 217.
(2) 2 Eq. C. Ab. 194; 7 Ves. 58, n.
(3) 6 Jur. (N.S.) 639.
(4) 4 Ex. D. 54.
(5) 26 Beav. 125.
(6) 4 De G. & Sm. 467.
(7) 7 Ves. 52, n.
(8) 10 Ves. 22.
(9) 10 Ves. 522.

which the gift is to be applied, and if that character is not charity, then the Court will not execute such an indefinite purpose, and it must be considered as if the legacy had been left to the legatee as a trustee, and with no trust declared, in which case he would hold it as a trustee for the next of kin. That really is what is laid down by the case of *Morice* v. *Bishop of Durham* (1), because there purposes not charitable were included in the objects to which the legatee was to apply the legacies in question.

But we must look to the will, and in my opinion Mr. Justice *Kay* was right in holding that the indefinite objects pointed out by the testatrix as those to which the fund was to be applied at the discretion of the Earl of *Shaftesbury*, were charitable. The words used in the introduction of the gift on which he was to exercise his discretion, are these: "Among such charities, societies and institutions" as the Earl of *Shaftesbury* should determine. I do not forget the words which I will deal with presently, "including or excluding those hereinbefore mentioned as may be preferred." This follows a gift to a number of definite objects, —I mean definite in this sense, that the particular institutions are pointed out which are to be the objects of the testatrix's bounty as respects the particular legacies which she has given.

Now, was the Judge right in holding that the power to apply to the "charities, societies and institutions," taking those words alone, was an appropriation to charity? I think he was.

We must look at the will generally in order to determine what those words in this particular will really mean, and we find this,— that the testatrix divided her personal estate into two portions. She directs that that portion which by law could not be applied to charitable bequests should be applied in paying certain legacies, and she gives the ultimate residue to a person named. Then she goes on, "and upon further trust out of such part of my personal estate as the law permits to be appropriated by will to charitable purposes to pay the following legacies," and she directs at the end of her will marshalling in favour of charitable legacies. Then she says out of that part of her personal estate which may be applied to charitable purposes, "to pay the following legacies to the

(1) 10 Ves. 522.

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treasurers or other proper officers respectively of the respective charities, institutions or societies hereinafter mentioned," and then she enumerates a number of societies and institutions, and although there is a question whether one, at least, of those societies or institutions is a charitable society, which for the purpose of determining this case I assume it was not—I mean not a charitable society or institution at the time of the testatrix's death—yet in my opinion, looking to those institutions which she points out, and the objects indicated by their titles, and the object of this particular one at the time when it properly held the title in question, she referred to these societies as, in her mind, being charitable societies, and as in her mind established for those objects which would be considered charitable by the Chancery Division.

That being so, when we come to the end of those particular gifts we find the words: "And upon further trust to pay and distribute all the residue of that portion of my said personal estate which may by law be appointed by will for such purposes" (that must mean the charitable purposes which she has already indicated) "among such charities, societies, and institutions, and in such shares and proportions as the said Earl of *Shaftesbury* shall by writing nominate." I have left out for the present the words "including or excluding," &c. Now, in my opinion, it is clear that although she used those three words, "charities, societies, and institutions," she had in her mind that which is generally expressed, and probably would be sufficiently expressed, by the first word used—"charities," and, having contemplated the gifts to the particular institutions which she named, all of which, to my mind, she considers as charities, she here means not to allow the Earl of *Shaftesbury* to give either to charities, or as an alternative, to institutions not charitable, but to point out charities administered or dealt with by societies, or institutions—that is not mere transitory charities, but charities which have the nature of permanence in them—like those objects which she had already pointed out. To my mind that first point, which was a necessary point to be established by the Respondents, is made out on this will, having regard, not only to the special words used in this particular portion of her will, but to the context and to the general

purport and object as indicated by the other portions of the will.

There are, it is true, these words "including or excluding those hereinbefore mentioned as may be preferred." Now I have assumed, as I have said, that the institution which has been so much discussed is not one which this Court would support as a charity, but in my opinion that will not make this gift bad. It is said that the Earl of *Shaftesbury* is enabled to include in the division of the estate purposes not charitable. Under the first portion of the clause "charities, societies, and institutions," I have already stated my opinion that he is not authorized so to do. Then there are certain specified things which he may include in the distribution if he thinks fit. Does that come within the principle of *Morice* v. *Bishop of Durham* (1)? In my opinion it does not. All that that case decided was this, that where there is no definite object pointed out as the object of the trust, then the Court says that the trust cannot be executed unless the Court can itself determine how it is to be applied, which it can only do where the object is a charity. But if there are definite objects pointed out and a discretion is given to trustees to distribute property amongst those definite objects, in my opinion that judgment in no way decides that such a gift fails. Take a gift to *A.*, *B.*, *C.*, or any number of individuals or institutions in such proportions as a trustee or any one else shall name and appoint; if the person designated does not exercise the discretion and power given, then the Court will execute the trust. It will do so, where the objects are definite, by deciding, unless there is something in the will to shew a contrary intention, that the fund which is the subject of the trust shall be divided equally amongst all the objects of the testator's bounty. The trustee to whom a discretion is given might have given it unequally—he might have excluded some if he thought fit; but where the Court, not having the discretion which is given to the trustee, has to administer the trust, in the absence of anything special in the instrument, it administers the trust by dividing the fund equally amongst the named and definite objects. In my opinion the mere fact that there is in addition to those named and definite

(1) 10 Ves. 522.

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objects, a general indefinite object, which is charity, will not make the gift bad. It would be good if it was limited to a charitable gift, although for purposes utterly indefinite; and the addition to that of definite purposes, though they are not all charities, will not, in my opinion, make the ultimate gift bad.

I do not think it necessary to decide, and it is better not to decide, whether if this institution, which I assume not to be a charity, had come to ask for a division or a share of the fund, and none had been given to it, it could have been said that that was right, or whether it could be said it was wrong to give a share to it because it was not a charity. It may be the meaning of this is, "I give it to be applied for charitable purposes, including such of the before-mentioned specified objects as are charities," and any that was not a charity would not be properly treated by the Earl of *Shaftesbury* as coming within those objects. But it is not necessary to decide that. All I decide is, that the mere addition to the general charitable purposes of certain definite objects does not make the gift bad because one of those objects is itself not a charity.

In my opinion the decision was right, and the appeal fails.

LINDLEY, L.J.:—

I am of the same opinion. Mr. Justice *Kay* by his judgment which is under appeal declared that having regard to the context of the will the words, "charities, societies, and institutions," mean charities and charitable societies and charitable institutions, and the Appellant, who is the sole next of kin of the testatrix, asks the Court to reverse that decision, and asks it to declare that according to the true construction of the will of the testatrix the words, "charities, societies, and institutions" in the power given to the Earl of *Shaftesbury* are not restricted to charities, charitable societies, and charitable institutions, and that consequently the disposition of the pure personal estate is void.

The question which arises has been stated by Lord Justice *Cotton*, and when we come to look at the frame of the will, when we come to observe the care taken by this testatrix to divide the personal estate into that which can be given to charitable purposes and that which cannot, and when we look to the expression

"charitable legacies" and "charitable purposes," and to the marshalling clause, it appears to me that the Court is almost forced to the conclusion that what she means by "charities, societies, and institutions" are such as can take only pure personal estate. It follows that what she means by "charities," societies, and institutions are charitable societies and charitable institutions as well as what she calls charities. I do not see that there is any real doubt about that.

Then she has specified a great number of institutions, and amongst them she has specified or referred to the *Society for the Suppression of Vivisection* and the *Home for Lost Dogs*. We have had some discussion as to whether they can be regarded as charitable institutions. Now, as described by her, I take it that there is no reasonable doubt that the bequest to the society which she mentions by the name "*Society for the Protection of Animals liable to Vivisection*" was a good charitable legacy. Whether there is any such society, or whether the society with altered objects can be regarded as an object of a charitable bequest, is another matter altogether, but that she described it and that she left her money to it and that she contemplated it as a charitable society, is I think manifest from the language which she has used.

Then as regards the *Home for Lost Dogs*, on the authority of the case of *University of London* v. *Yarrow* (1) I think the *Home* is what is called a charitable institution.

Then we have to consider what the effect of that is upon the gift of the residue. It has been argued on the one side that there is such uncertainty in this gift as to bring the case within *Morice* v. *Bishop of Durham* (2), and on the other hand it has been contended that when you understand the testatrix to mean by charities, societies, and institutions, nothing but charitable societies and charitable institutions, the mere addition of one or two institutions which are named which may not be charitable does not introduce such an element of uncertainty as to make that part of her will void. It appears to me the contention of the Respondents upon that point is right, and the passage in *Jarman* on Wills (3) to which we were referred by the Attorney-

(1) 1 De G. & J. 72. (2) 10 Ves. 522.
(3) 4th Ed. vol. i. p. 217.

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General, and the case of *Attorney-General* v. *Doyley* (1) which is there referred to, carry them through. There is no such uncertainty in this case when construed as we construe it, as there was in the case of *Morice* v. *Bishop of Durham* (2), nor do I think that any of the other objections which have been urged really prove fatal to the title of the societies. I do not say—it is unnecessary to say—whether the *Society for the Suppression of Vivisection* in its present shape is as good an object for a charitable bequest as it was. I give no opinion at all about it one way or the other, but assuming it was not, it will not vitiate this bequest.

It appears to me, therefore, the appeal ought to be dismissed with costs.

BOWEN, L.J.:—

I entirely agree, resting my judgment on the grounds which were mentioned, and reserving, if necessary, for any further consideration in any future case the question whether the *Society for the Protection of Animals from Vivisection* in its present form is a charitable society within the meaning which this Court puts on the term. I express no opinion one way or the other. I think we are right in not deciding that point finally, because the materials put before us as to the purposes of that society and its history are in a scattered and imperfect form.

Solicitors: *Foster & Spicer; Sismey & Sismey*, agents for *Essell, Knight & Arnold, Rochester; Hare & Co.; Julian Sharman; Nicholl, Manisty & Co.; Hallowes, Price & Hallowes.*

(1) 2 Eq. C. Ab. 194; 7 Ves. 58, n. (2) 10 Ves. 522.

M. W.

GUY *v.* CHURCHILL.

C. A.
1887
May 4.

[1884 G. 1016.]

Solicitor—Lien—Property recovered—Costs ordered to be refunded—23 & 24 *Vict.* c. 127, s. 28.

Costs paid under order of the Court below and ordered by the Court of Appeal to be refunded are property recovered within the meaning of the 23 & 24 Vict. c. 127, s. 28.

An action was dismissed with costs, which were taxed at £298 and paid. On appeal this judgment was reversed, leave was given to amend the pleadings, and the action was ordered to proceed on the amended pleadings, and the Defendants were ordered to repay to the Plaintiffs the costs they had received, and to pay to the Plaintiffs their costs of the appeal, which were taxed at £165. After this the Plaintiffs became bankrupt:—

Held, on the application of the solicitors who had acted for the Plaintiffs in the appeal, that they were entitled to receive from the Defendants the £165, and also to receive from the Defendants out of the £298 the difference between the £165 and the Plaintiffs' costs of the appeal taxed as between solicitor and client, and that the balance only of the £298, after paying the above difference and the costs of the solicitors and the Defendants of the application, was to be paid to the trustee in the bankruptcy.

THIS was an action to set aside accounts rendered by the Defendants as agents to the Plaintiffs, and for an account of the profits arising from goods bought and sold by the Defendants as agents. On the 28th of July, 1886, Mr. Justice *Stirling* dismissed it with costs, without prejudice to any other action with regard to the same subject matter.

The Defendants' costs were taxed under this order at £298 7*s.* 1*d.* and were paid in January, 1887.

The Plaintiffs appealed from the judgment of dismissal, and on the 15th of March, 1887, the Court of Appeal discharged the judgment, ordered the Defendants to repay to the Plaintiffs the £298 7*s.* 1*d.*, and to pay to the Plaintiffs their costs of the appeal. Liberty was given to the Plaintiffs to amend their statement of claim, and to the Defendants to amend their defence, and it was ordered that the action should be proceeded with on the amended pleadings.

The Plaintiffs' costs of the appeal were taxed as between party and party at £165 18*s.*

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The Plaintiffs between the trial of the action and the hearing of the appeal presented petitions in bankruptcy, and a receiving order was made against them. No trustee had been appointed, but the official receiver represented their estates.

Messrs. *Irvine & Hodges*, the solicitors of the Plaintiffs, moved the Court of Appeal for an order declaring that they were entitled to a lien upon the £298 7*s.* 1*d.* for extra costs, and the £165 18*s.* for their taxed costs as solicitors of the Plaintiffs of or in reference to the appeal.

It was stated that the extra costs of the appeal as between solicitor and client were about £159, but they had not been taxed.

L. E. Pyke, for the Applicants :—

We claim a lien on the £298 7*s.* 1*d.* such as was held to exist in *Ex parte Cleland* (1). Before the statute 23 & 24 Vict. c. 127, s. 28, a solicitor had a lien on money recovered by his exertions, and the object of the enactment was to extend the right to real estate. The right was not peculiar to Courts of Common Law, where the money was received in the first instance by the attorney of the successful party ; the same rule prevailed in equity, *Bozon* v. *Bolland* (2), where the solicitor was held entitled to a lien which he could enforce actively upon the fund recovered in the cause, though it never was in his possession : *Cain* v. *Adams* (3) ; *Haymes* v. *Cooper* (4). The £298 7*s.* 1*d.* was a sum recovered by the exertions of the Applicants—it was lost when ordered to be paid by the Plaintiffs to the Defendants, and when the Defendants were ordered to repay it that was a recovering of it. It would be very hard if a solicitor were to pay costs out of his own pocket, which would often be the case, and that, when they were ordered to be refunded, the client and not the solicitor should get them. We are entitled then to a lien on the £298 7*s.* 1*d.* The case is still clearer as to the £165 18*s.*

Muir Mackenzie, for the official receiver :—

I submit that this was not money recovered or preserved in the

(1) Law Rep. 2 Ch. 808.
(2) 4 My. & Cr. 354.
(3) 5 L. J. (N.S.) K. B. 252.
(4) 33 Beav. 431.

suit. The Plaintiffs as regards the suit are where they were before; there is merely a *lis pendens* which at present has resulted in nothing. In *Bozon* v. *Bolland* (1) and *Haymes* v. *Cooper* (2) the fund was in the hands of the Court, which makes an important difference. There is no case in point. I do not dispute the claim of the Applicants to the £165 18*s.*

Buckley, Q.C., for the Defendants, took no part in the argument being only a stakeholder.

COTTON, L.J.:—

This case involves two questions—first as to the £165 18*s.* About that there is no difficulty, the sum must be paid to the Applicants.

The other question relates to a lien on a sum which had been ordered by the Court below to be paid by the Plaintiffs to the Defendants, but was ordered by this Court to be repaid. The question is a nice and novel one, but I think that it is governed by the principle that a solicitor has a lien on what is recovered in an action, although the recovery of this sum was not the direct result of the action. This Court ordered the refunding of a sum which had been paid under an order of the Court below, and I think that this was a sufficient recovery, though it was not the general result of the suit. The lien of a solicitor is grounded on the principle that it is not just that the client should get the benefit of the solicitor's labour without paying for it. Here the official receiver wishes to get the benefit of the solicitor's exertions by which the £298 7*s.* 1*d.* has been recovered, without paying for them. The solicitors are entitled not only to receive the £165 18*s.*, the Plaintiffs' costs of the appeal as between party and party, but also to receive out of the £298 7*s.* 1*d.* the difference between the £165 18*s.* and the Plaintiffs' costs of the appeal taxed as between solicitor and client. The costs of the Applicants and of the Defendants of this application will also be paid out of the £298 7*s.* 1*d.*, and the surplus will be paid to the official receiver.

(1) 4 My. & Cr. 354. (2) 33 Beav. 431.

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LINDLEY, L.J.:—

I agree and have nothing to add. It is right that they who get the benefit of the recovery of money should bear the expense of recovering it.

BOWEN, L.J.:—

I am of the same opinion. The £298 7*s.* 1*d.* is the fruit of the exertions of the Applicants.

Solicitors for Applicants: *Irvine & Hodges.*
Solicitor for Official Receiver: *W. W. Aldridge.*
Solicitors for Defendants: *Hollams, Son, & Coward.*

H. C. J.

C. A. 1887 NORTH, J. *April* 29; *May* 6. C. A. 1887 *May* 16.

In re MORGAN. OWEN *v.* MORGAN.

[1886 M. 880.]

Practice—Rules of Supreme Court, 1883, *Order* XIX., *rr.* 4, 16, 24, *and* 27; *Order* XX., *r.* 7—*Alternative Pleading—Embarrassing and inconsistent Defences—Costs of Shorthand Note of Judgment.*

Pleadings will not necessarily be struck out as embarrassing because they are inconsistent.

In an action by the representatives of a wife against the executor of the husband in respect of sums of money and stock alleged to have been received by the husband as trustee for the separate use of the wife, the defence pleaded (1) that the sums had not been received; (2) if received, not as trustee; (3) if received, repayment; (4) alternatively, free gift by the wife to the husband; (5) alternatively, accord and satisfaction; (6) alternatively, set-off; (7) the *Statute of Limitations*; (8) laches and delay.

On a summons to have defences 3, 4, 5, and 6 struck out, *North,* J., declared that the statement of defence was embarrassing, and gave the Defendant leave to amend.

Upon appeal, the Court (*Lindley* and *Bowen,* L.JJ.) discharged the order of *North,* J., and directed the Defendant either to amend or to give particulars within fourteen days after discovery of documents.

It is unnecessary for a successful appellant to make special application for allowance of the costs of the shorthand writer's note of the judgment of the Court below.

THE Plaintiffs were the administrators with the will annexed of *Anne Morgan,* late wife of *Howel Morgan.* She died in her

husband's life. The Defendant was the executor of *Howel Morgan*. The Plaintiffs claimed a declaration that *Howel Morgan* had received a sum of £6000 as trustee for *Anne Morgan* and as part of her separate estate, and payment of the same with interest; a declaration that *Howel Morgan* received a sum of £663 18*s*. New 3 per Cent. Annuities, two sums of £100 and £50 cash, and a portion of a sum of £15,000, as trustee of a settlement, that was to say, on trust for himself for life, and, subject to his life interest, for *Anne Morgan* for her separate use, and payment of the same with interest from the time of his death.

The Defendant put in a defence and counter-claim. The 9th paragraph of the statement of defence denied that *Howel Morgan* had received any of the sums above mentioned. If he had received the £6000 the statement of defence denied that he had received it as trustee or had ever promised to repay it to *Anne Morgan*. If he had received any of the other sums the statement of defence denied that he had received them upon trust. Paragraph 13 of the statement of defence alleged that if *Howel Morgan* had received any of the sums mentioned in the 9th paragraph of the statement of defence he had paid them to *Anne Morgan* in her lifetime. Paragraph 14 alleged "alternatively" that if *Howel Morgan* received any part of the sums mentioned in the 9th paragraph of the defence *Anne Morgan* had authorized such receipt and made a voluntary gift of the moneys received. Paragraph 15 alleged "alternatively" that if *Howel Morgan* received any part of the said sums it was agreed between himself and *Anne Morgan* that he should retain the same in part payment of the income of settled property to which he was entitled. Paragraph 16 alleged "alternatively" that *Anne Morgan* was at the time of her death indebted to *Howel Morgan* in an amount equal to the Plaintiffs' claim, which the Defendant was willing to set off. The particulars of indebtedness were stated in the counter-claim. The Defendant also set up the *Statute of Limitations*, and laches and delay.

The Plaintiffs applied to strike out as embarrassing the defence in paragraphs 13, 14, 15, and 16.

The summons came on before Mr. Justice *North* on the 29th of April, 1887.

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Cozens-Hardy, Q.C., and *B. Eyre*, for the Plaintiffs:—

The defence is embarrassing in that, by setting up a number of inconsistent statements of facts, it prevents the Plaintiffs from knowing what they have to meet at the trial. The reason of the old rule of pleading laid down in *Rawlings* v. *Lambert* (1), that a plaintiff could not plead inconsistent facts, is applicable to all pleadings under the present law: *Bagot* v. *Easton* (2). Order XIX., rule 16, shews that the present rules discountenance inconsistent pleadings as to facts.

Upjohn, for the Defendant:—

Under the *Common Law Procedure Act*, 1852, inconsistent defences were sanctioned. The practice not having been expressly altered by the existing rules remains the same. On the contrary, there is greater liberty in that respect under the present practice: *Child* v. *Stenning* (3); *Hall* v. *Eve* (4). It is not reasonable that the liberty of a defendant should be curtailed in that respect. *Berdan* v. *Greenwood* (5); *Hawkesley* v. *Bradshaw* (6); *Wheeler* v. *United Telephone Company* (7); *Goutard* v. *Carr* (8), are instances of the allowance of inconsistent defences.

The Defendant, from his position as executor, is much embarrassed by the pleading of the Plaintiffs; he does not know what the real facts are; he is obliged to set up such defences as may meet any facts that may be proved at the trial; it is thought that one defence may apply to one part of the funds and another to another when the truth comes out.

[NORTH, J.:—The Court has ample power to give leave to amend so as to meet the true facts when they come out.]

That is subject to penalty. The Plaintiffs are really not embarrassed, for the same evidence would be addressed to all the points. And if that were not so, it would merely be the trial of successive issues. Order XIX., rule 16, shews that inconsistent facts can be pleaded in the same pleadings either originally or by amendment.

(1) 1 J. & H. 458, 466.
(2) 7 Ch. D. 1.
(3) 5 Ch. D. 695.
(4) 4 Ch. D. 341, 347.
(5) 3 Ex. D. 251.
(6) 5 Q. B. D. 302.
(7) 13 Q. B. D. 597.
(8) Ibid. 598, n.

[NORTH, J.:—It may not be right to tie the Defendant up to particular defences, though the present pleadings are embarrassing.]

If the Court is against me, liberty to amend might be allowed.

NORTH, J.:—

The 4th rule of Order XIX. says: "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be."

Now what has been argued before me is that the Defendant, whether he knows the facts or not, is entitled to set up any number of different inconsistent states of facts that he pleases. In other words, he may set up what cannot possibly be states of fact but what in reality are fictions, and therefore in order to make his defence he may put forward a state of facts which he believes to be the state of facts, and side by side with that state of facts several fictions which he does not believe to be well founded. I am not prepared to say that the general rule does not permit that course. It may be that the rule, which says that the defendant may set up the statement of the material facts upon which he relies, may enable him to set up what he knows are not the facts, and it will not be until the trial of the action that it will turn out that he has done what the rule did not strictly justify his doing. In fact he will have departed from the rule, but will not have been found out in doing so. But if a defendant goes so far as to state two states of facts inconsistent with one another, then he cannot help being found out on the pleading itself, and that is the particular thing for which the General Orders provide. They do enable him to do what he could not do before, plead special inconsistent defences without leave. The General Orders provide for it, and the first case upon which Mr. *Upjohn* relies states the rule very clearly in a way in which in my opinion I ought to concur. I refer to the case of *Berdan* v. *Greenwood* (1), where Lord Justice *Thesiger*, in the course of his judgment, after referring to the old state of

(1) 3 Ex. D. 251.

C. A. 1887 *In re* MORGAN. OWEN *v.* MORGAN. North, J.

things in which inconsistent defences might be pleaded but some only required leave, says (1): "In this state of circumstances, the *Judicature Acts* and Orders came into existence, and swept away the old forms and practice of pleading, leaving it open to a defendant, as the general rule, to raise by his statement of defence without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in rule 1, Order XXVII., which is in these terms: 'The Court or a Judge may, at any stage of the proceedings, allow either party to alter his statement of claim, or defence, or reply, or may order to be struck out or amended, any matter in such statements respectively, which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties.'"

Now, in the present case, the Defendant has set up several defences which are founded on states of facts which cannot exist together. It seems to me there is no answer to the Plaintiffs' suggestion that setting up these different states of facts embarrasses them, and the answer made to the Plaintiffs on that point that they need not be embarrassed because they may take them separately and deal with each separately, and provide themselves with the evidence necessary to meet each separately, seems to me to be no answer at all. The main object, or one of the main objects, of this rule is that the one party may know what are the facts on which the other party relies in order that he may be prepared to meet the case. The object is not to enable parties to set up fictitious defences; and as soon as they can be detected in doing so, such defences as may embarrass will be struck out, and so, in the same way, if the pleading is by way of statement of claim or reply.

But then Mr. *Upjohn* says his client is an executor, and he does not know what the facts are. That is very good reason for not pleading facts he does not know; but it is no reason for setting up different states of things of which he knows nothing. His course is obvious; there is no doubt what he may do, but he

(1) 3 Ex. D. 255.

must not invent defences, and if the Plaintiffs object to being embarrassed by them he must not expect the Plaintiffs will not get relief under the Order which I have just read.

Then Mr. *Upjohn* says these are not inconsistent statements of facts, because the claim relates to various sums of money, and some of the defences apply to one and some of the defences apply to another. That may well be so, but if so let him point out to which sum one of the defences applies, and to which sums other defences apply. Then he says that some of these different defences apply to the same sum, partly to one part of the sum and partly to another part. Let him plead to what part one state of facts applies and to what part the other state of facts applies. If he puts it in this way: As to the sum of X, part of it I never received, and the other part I repaid, that seems to me to be perfectly good pleading. It is quite true that he may be asked for particulars, and he may then be in a state of embarrassment to say how much was not received and how much was repaid. But I cannot, in order to enable him to set up defences of which he knows nothing, allow him to set them up in such a way as to embarrass the Plaintiffs.

Under these circumstances the only difficulty is as to the exact form the order should take, because the Defendant has the right to say which of his defences he will stand by, and he ought not to be limited to such of his defences as the Plaintiffs might select to stand, striking out the others. I think the best form of order I can make is not to strike out the particular paragraphs referred to in the summons, but to express my opinion that the defence is embarrassing, and give the Defendant leave to amend. The Plaintiffs have succeeded in the application, and the costs must be theirs in any event.

D. P.

From this judgment the Defendant appealed; and the appeal came on for hearing on the 16th of May, 1887.

Aspland, Q.C., and *Upjohn*, for the Appellant:—

The learned Judge of the Court below seems to have considered that every inconsistent pleading must necessarily be embarras-

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sing; but no pleading is embarrassing which fairly tells the other party what case he will have to meet at the trial. And if a pleading could not be struck out when standing alone, there is no reason why several such pleadings should be struck out when standing together. In this kind of case it would obviously be a hardship upon the Defendant, an executor who knows little or nothing of the facts of the case, to be pinned down to one particular line of defence. Moreover one of the Forms of Defence given in Appendix D. to the Rules of the Supreme Court, upon which our pleading is modelled, gives eight different defences, of which five are inconsistent. [They referred to *Spurr* v. *Hall* (1), *Berdan* v. *Greenwood* (2), and *Hawkesley* v. *Bradshaw* (3).]

Cozens-Hardy, Q.C., and *B. Eyre*, for the Plaintiffs:—

The Judge below has given to the Appellant everything to which he is entitled. Under the old practice a party might state facts and ask alternative relief according to the conclusions of law which the Court might draw from them, but he could not allege two inconsistent states of facts and ask alternative relief: *Rawlings* v. *Lambert* (4).

Here there are seven distinct defences, which are in effect allegations of inconsistent states of facts: *Davy* v. *Garrett* (5). Under Order XIX., rule 4, the material facts, and those only, are to be stated, and two or more inconsistent facts cannot be the only facts upon which the party relies, because if he relies on one he cannot rely on the other or others. In this case the pleader does not state anywhere that the Defendant is ignorant of the facts, but he has simply taken every possible state of facts which could have existed, and has pleaded them all, whether inconsistent or not. This is embarrassing to the Plaintiffs, who do not know what case they have to meet, but must go into evidence upon every one of these fictitious and inconsistent defences.

[They also referred to *Bagot* v. *Easton* (6).]

No reply was called for.

(1) 2 Q. B. D. 615.
(2) 3 Ex. D. 251.
(3) 5 Q. B. D. 302.
(4) 1 J. & H. 458.
(5) 7 Ch. D. 473, 483.
(6) 7 Ch. D. 1.

LINDLEY, L.J.:—

I think that in this case the learned Judge in the Court below has taken too strict a view of the Order as to pleadings. He has evidently proceeded on the principle that inconsistent defences are embarrassing and ought not to be allowed. That view appears to me not to be warranted by the Orders when properly construed.

The learned Judge has relied in particular upon Order XIX., rule 4, the important part of which runs thus: "Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."

Now I cannot myself construe that Order as prohibiting inconsistent pleadings. One sees perfectly well what is meant by it, viz., that each party is to state succinctly and concisely and in a summary form the material facts on which he relies. Now a person may rely upon one set of facts, if he can succeed in proving them, and he may rely upon another set of facts, if he can succeed in proving them; and it appears to me to be far too strict a construction of this Order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark. Let us take this particular case—an action by the executor of one person against the executor of another person—and let us assume, what may well happen, viz., that the Defendant, who is the executor of the husband, really knows nothing at all.

Now what is he to do? He cannot safely and consistently with the pleading rules do nothing and say to the Plaintiffs, "Prove that you are entitled to recover this money from my testator's estate" for the rules as to pleading do not allow that. If he thinks the facts will establish affirmative defences, such as payment, or release, and so on, he must plead such defence; otherwise, when he comes to trial it will be said against him: "You cannot avail yourself of that defence, because you have not pleaded it." Now what is he to do? It appears to me that he can in such a case only do that which in substance he has done here, that is to say, forecast, as well as he can, what possible defences may arise out of the evidence to be given at the trial, and put these down under

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short heads as the material facts on which he relies at the time at which he puts in his defence. At the trial he will rely upon such of them as he can prove or as may come out on the evidence.

I quite see that that power may be very much abused. It may be abused to such an extent as to be embarrassing and unfair and oppressive to the other side. To correct that there is rule 27 of the same Order which enables a Judge to strike out as embarrassing any pleading, whether it is an alternative pleading or whether it is not. But to go the length of saying that no inconsistent pleading can be pleaded, which is the view taken by the learned Judge in the Court below, appears to me not warranted by the rules and contrary to the established practice of the Courts.

There is no difference in this respect between the practice in the Chancery Division and the practice in the Queen's Bench Division, where, we know, ever since the *Judicature Acts* have passed, inconsistent defences, such as never indebted and payment, are daily pleaded, and they give rise to no trouble. They are not considered embarrassing, and if you add to them a set-off, it does not make them embarrassing.

If we look at these particular pleadings, they are not quite so full as one would like them to be. They are not so specific as they ought to be if the Defendant had the materials for improving them. And what appears to me and what appears to my Brother Lord Justice *Bowen* to be right is this—to discharge the order of Mr. Justice *North* and to direct that the Defendant amend his pleadings or give particulars within a fortnight after discovery. He ought to do one or other of two things—either amend the pleadings or give particulars of paragraphs 13, 14, 15 and 16. That appears to us to meet the justice of the case. If he cannot give particulars he must say so, and if he cannot amend on the materials he must say he is unable to do so, but we give him the option of doing one or the other within fourteen days after discovery of documents and make the costs both below and here costs in the action.

BOWEN, L.J.:—

I am of the same opinion.

Mr. *Aspland* :—Will your Lordships allow the costs of the short-hand writer's notes of the judgment of the Court below?

LINDLEY, L.J. :—Yes, that goes without saying.

Solicitors for Appellant: *Morgan, Son, & Upjohn.*
Solicitors for Respondents: *Crouch, Spencer, & Edwards.*

W. W. K.

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Oct. 26, 27, 28; Nov. 1, 2, 8.

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Company—Winding-up—Directors—Misfeasance—Rate of Interest charged—Payment of Dividends out of Capital—"Realized Profits"—Directors' Remuneration.

The articles of association of a limited company provided that no dividends should be payable except out of "realized profits," and that no remuneration should be paid to the directors until a dividend of 7 per cent. had been paid to the shareholders. The business of the company consisted chiefly in lending money to builders on mortgages payable by instalments, and the directors treated, as part of the profits available for dividends, the value for the time being (upon an estimate made by their surveyor who was also their secretary) of the instalments of principal and interest remaining unpaid by each mortgagor. Upon this footing the directors paid for several years, out of the floating capital from time to time in their hands, (1) dividends of 7½ per cent. and upwards; (2) remuneration to themselves. Upon a summons taken out in the winding-up of the company by a creditor:—

Held, that "realized profits" must be taken in its ordinary commercial sense as meaning at least "profits tangible for the purpose of division," and that the directors having treated estimated profits as realized profits, and having in fact paid dividends out of capital, on the chance that sufficient profits might be made, were jointly and severally liable, as upon a breach of trust, to repay, and must repay, the sums improperly paid as dividends, and also the remuneration they had respectively received, with interest in each case at 4 per cent.

The directors also, without the knowledge of the shareholders, voted and paid themselves out of the funds of the company a commission on certain purchases and sales, and entered such payment in the books of the company, but made no mention of it in their reports or balance-sheets:—

Held, that they were jointly and severally liable to repay, and must repay, this amount with interest at 5 per cent.

THIS was a summons in the winding-up of this company taken out by a creditor under the 165th section of the *Companies Act*, 1862, for the purpose of obtaining from five of the directors repayment of various sums, amounting to upwards of £40,000, alleged to have been misapplied by them out of the funds of the company.

The company was a building and investment company formed in February, 1866, for the purpose of dealing in land and secu-

rities, and the principal charges against the directors were, first, that from the commencement they continually paid to the shareholders dividends out of capital; and, secondly, that they paid to themselves remuneration to which they were not entitled.

The articles of association of the company material to the first charge were as follows:—

Article 102 directed that the directors should cause true accounts to be kept in books of account.

Article 104 directed that in every year the directors should lay before the shareholders in general meeting a statement of the income and expenditure of the company.

Articles 105 and 106 provided as follows:—

"105. The statement so made shall shew arranged under the most convenient heads the amount of gross income, distinguishing the several sources from which it has been derived, and the amount of gross expenditure, distinguishing the expenses of the establishment, salaries, and other like matters. Every item of expenditure fairly chargeable against the year's income shall be brought into account, so that a just balance of profit and loss may be laid before the meeting; and in cases where any item of expenditure which may in fairness be distributed over one or several years has been incurred in any one year the whole amount of such item shall be stated, with the addition of the reasons why only a portion of such expenditure is charged against the income of the year.

"106. A balance-sheet shall be made out and laid before each ordinary general meeting of the company, and such balance-sheet shall contain a summary of the property and liabilities of the company, arranged under proper distinguishing heads so as to present an accurate and comprehensive view of the financial position of the company."

Then, after providing for the audit of the accounts, by the 120th article, the directors were empowered with the sanction of the company in general meeting to declare a dividend or bonus to be paid to the shareholders in proportion to their shares, and the 121st and 122nd articles were in these words:—

"121. No dividend shall be payable except out of the realized profits arising from the business of the company.

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"122. Previously to the directors recommending any dividend or bonus they may set aside out of the profits of the company such sum as they may think proper as a reserve fund, and shall invest the sum so set apart upon government securities, parliamentary stocks or funds, or real securities as they may think fit."

Article 61, upon which the second charge against the directors arose, will be found in the judgment of the Court.

The business of the company chiefly consisted in making loans to persons about to build upon mortgage of the buildings to be erected, which loans were repayable by small instalments extending over a period of fourteen years. It was the practice of the directors to estimate the profits of the company available for dividend by making out an account of liabilities and assets and treating the excess of the amount of assets over liabilities as profits. The most important item of assets in the account was "present value of repayments and value of properties in hand." This value was arrived at by calculating from year to year upon a 5 per cent. annuity table the present value of the instalments of principal and interest remaining unpaid by each mortgagor. The only valuation the directors had made and that on which they acted was one made from time to time by a Mr. *Galpin*, who was their surveyor and also their secretary. And it was the practice of the directors after making a loan to treat the accretion due to this calculation, amounting sometimes to 17 per cent., as a realized profit; and they paid dividends on this basis in several years amounting to 10 per cent., but always, except in one year, exceeding 7½ per cent. These payments were in fact made out of the floating capital from time to time in the hands of the directors, and upon the assumption that the mortgage securities they had taken were sufficient to repay the loans they had made with interest and costs, which turned out in very many instances not to be the case.

Three of the Respondents to this summons, viz., Messrs. *Saunders*, *Cavill*, and *Wheeler*, had been directors from the formation of the company, and the other two, Messrs. *Scroggs* and *Bravington*, were appointed co-directors with them on the 2nd of May, 1876. On the 17th of April, 1883, a resolution was passed for the voluntary winding-up of the company, and on the 11th

of May, 1884, an order was made that the voluntary winding-up should be continued under the supervision of the Court.

The remainder of the facts and the evidence in support of the summons sufficiently appear from the judgment of Mr. Justice *Kay*.

The summons was adjourned into Court and now came on for hearing.

Hastings, Q.C., *Ashton Cross*, and *Hamilton*, in support of the summons:—

1. The directors have habitually calculated their assets for the purpose of dividends upon the footing of including as realized profits estimated profits, *i.e.*, payments which had not been, and in very many instances never were made, without making any allowance for bad debts or depreciation of property; and they have paid the dividends out of the floating capital in their hands. There is no suggestion that they did so fraudulently, but they are trustees, or *quasi* trustees, of the capital of the company, and this course was *ultrà vires* and incapable of ratification by the shareholders, and therefore the *bona fides* and good intentions of the directors can be no defence as against a creditor of the company: *Flitcroft's Case* (1); *Salisbury* v. *Metropolitan Railway Company* (2). They had no proper valuation. Their balance-sheet contained no profit and loss account, and it lies on them to shew that the dividend was properly paid out of profits: *Rance's Case* (3). The payment of dividends out of capital is a breach of trust which directors are jointly and severally liable to make good with interest at 4 per cent. at all events: *Evans* v. *Coventry* (4); *Salisbury* v. *Metropolitan Railway Company*; *In re National Funds Assurance Company* (5). Even 5 per cent. has been allowed: *In re Alexandra Palace Company* (6).

2. The 61st article of association provides that "no remuneration shall be paid to the said directors until a dividend at the rate of 7½ per cent. shall have been paid to the shareholders;" and as no dividend of 7½ per cent. was ever properly paid, the directors never were entitled to any remuneration at all.

(1) 21 Ch. D. 519.
(2) 22 L. T. (N.S.) 839.
(3) Law Rep. 6 Ch. 104.
(4) 8 D. M. & G. 835, 845.
(5) 10 Ch. D. 118.
(6) 21 Ch. D. 149, 163.

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Sir *H. Davey*, Q.C., and *Maclean*, Q.C., for the Respondents, Messrs. *Saunders, Cavill, and Wheeler*:—

These directors were large original shareholders and bought further shares at a premium; their interests were identical with those of the other shareholders, and they have not been guilty of any misfeasance from which they have derived advantage. The evidence shews that they honestly valued their assets through their surveyor, that they had not been party to any dividend which they did not consider had been properly earned, and that if the dividends had been paid out of cash profits only the business could not have been carried on.

Where directors acting *bonâ fide* in the discharge of their duty have honestly valued their assets and have paid a dividend in accordance with that valuation, the Court will not, although the valuation subsequently turns out to be over sanguine and erroneous, order them to repay the moneys they have so paid away, even those paid to themselves: *Stringer's Case* (1); *London Financial Association* v. *Kelk* (2); *In re National Funds Assurance Company* (3); *In re Denham & Co.* (4); *Joint Stock Discount Company* v. *Brown* (5); *Pickering* v. *Stephenson* (6); *Studdert* v. *Grosvenor* (7). In *Rance's Case* (8) there was fraud. In *City of Glasgow Bank* v. *Mackinnon* (9), where it was sought to make a director liable for the payment of interest out of capital, the directors who had acted *bonâ fide* were held not to be liable although their estimate was erroneous, and their valuation turned out to be inaccurate. According to Lord *Shand* (10) "it is clear that it is not necessary that there must be cash realized, and in the coffers of the bank, received expressly on account of interest or profits, in order to justify the payment of a dividend. To enforce such a rule would be to run counter to ordinary and reasonable usage in the case of mercantile companies. In order to ascertain the profits earned and divisible at any given time, the balance-sheet

(1) Law Rep. 4 Ch. 475, 486.
(2) 26 Ch. D. 107, 143, 144.
(3) 10 Ch. D. 118.
(4) 25 Ch. D. 752.
(5) Law Rep. 3 Eq. 139; 8 Eq. 381.
(6) Law Rep. 14 Eq. 322.
(7) 33 Ch. D. 528.
(8) Law Rep. 6 Ch. 104.
(9) 19 Sc. Law Rep. 278; 9 Court Sess. Cas. 4th Series, 535.
(10) 19 Sc. Law Rep. 316; 9 Court Sess. Cas. 4th Series, 602.

must contain a fair statement of the liabilities of the company, including its paid-up capital; and, on the other hand, a fair or more properly *bonâ fide* valuation of assets, the balance, if in favour of the company, being profits. These profits may, and must often to a great extent, be represented by obligations of debtors, often secured, and by direct securities over property. They are not the less profits fairly realized and divisible because they exist in that form and have not been received in cash;" and that is applicable to the present case. Here the value of the security should in fairness be taken not at its value now, but at its value at the time of the valuation, when the company was a going concern, and before the great depreciation which has since taken place. The expression "realized profit" only means "real profit honestly earned" or "profit made," and if the security given is sufficient the profit is made.

[KAY, J.:—Surely "realized profit" cannot be the same as "estimated profit," and is used as a word of contrast.]

"Realized profit" need not be cash profit actually in hand. All profit is a matter of estimate—the balance of assets and liabilities. It is only a question of a proper margin. If a banker discounts a bill he rebates it and divides the difference as profit. But whatever be the meaning of "realized profits" the course of dealing has been ratified by the shareholders; and the clause where the expression occurs is one relating to the rights of the shareholders *inter se*, and the prohibition it contains could be and must after the lapse of sixteen years be held, even without express ratification by the shareholders, to have been waived by them, and their ratification, waiver, or acquiescence would be fatal to any claim of the creditors, for whom the directors of a going concern cannot be said to be trustees: "The creditors have certain rights against a company and its members, but they have no greater rights against the directors than against any other members of the company:" *Poole, Jackson, and Whyte's Case* (1); *Phosphate of Lime Company* v. *Green* (2); *Ashbury Railway Carriage and Iron Company* v. *Riche* (3); *Waterhouse* v. *Jamieson* (4); *Eley* v.

(1) 9 Ch. D. 322, 328.
(2) Law Rep. 7 C. P. 43.
(3) Law Rep. 7 H. L. 653.
(4) Ibid. 2 H. L., Sc. 29.

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Positive Government Security Life Assurance Company (1); *In re Empress Engineering Company* (2). Moreover, there is no sufficient evidence that any dividend was actually paid out of capital; and the directors, who could not value for themselves, employed *Galpin*, a surveyor, who was competent, and none the less so because he was their secretary, and were justisfied in relying on his valuation: *Stringer's Case* (3); *Parker* v. *McKenna* (4); *City of Glasgow Bank* v. *Mackinnon* (5).

Buckley, for the Respondents *Scroggs* and *Bravington*:—

These directors were not original directors, but joined the board after the company was an established concern; and they simply continued in perfect good faith what they believed to be a sound and proper course of business. What are "realized profits" cannot be ascertained except by estimate, in which future loss and future profit must be taken into account, and the question is not whether the surveyor of the directors made a mistake in his valuation, but whether they themselves acted with *bona fides*.

Creed, for the Liquidator.

Hastings, in reply:—

"Realized profits" must be profits actually got, and not profits expected to be received; and the evidence does not shew that profits had been honestly earned. Neither *Salisbury* v. *Metropolitan Railway Company* (6) nor *Evans* v. *Coventry* (7) were cited in *London Financial Association* v. *Kelk* (8), and none of the cases cited shew that in order to render directors liable it is necessary to prove fraud or gross negligence. If they pay dividends out of capital they are liable, whether they have done so in good faith or not.

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The first and most important charge against the directors is, that from the commencement of the company they have continu-

(1) 1 Ex. D. 20, 88.
(2) 16 Ch. D. 125.
(3) Law Rep. 4 Ch. 475, 486.
(4) Law Rep. 10 Ch. 96.
(5) 19 Sc. Law Rep. 1881, 278; 9 Court Sess. Cas. 4th Series, 535.
(6) 22 L. T. (N.S.) 839.
(7) 8 D. M. & G. 835.
(8) 26 Ch. D. 107, 144.

ally paid dividends out of capital. It was argued that even if that were so they could not be made liable unless their conduct amounted to fraud. From that proposition I must express my dissent.

It is settled by authorities which I cannot dispute—

1. That directors are *quasi* trustees of the capital of the company.

2. Directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up.

3. This liability may be enforced by a creditor or by the liquidator, under sect. 165 of the Act of 1862, or by the incorporated company before a winding-up.

4. The acquiescence of the shareholders does not affect the creditors in such a case.

5. Such an act is a breach of trust, and the remedy is not barred by the *Statute of Limitations*.

These points were determined in *Evans* v. *Coventry* (1), *Salisbury* v. *Metropolitan Railway Company* (2), *In re National Funds Assurance Company* (3), and in *Flitcroft's Case* (4).

A question has been raised and much argued concerning the meaning of the provisions of the articles of this company relating to the payment of dividends.

The company was a building and investment company. Its business consisted in lending money, generally at 8½ per cent., to persons who were building, the security taken being a mortgage of the property to be built on. The terms of such mortgages were, that the principal and interest should be paid by a number of small equal instalments extending over a period of fourteen years.

Three-fourths of these loans, roughly speaking, were to speculative builders, most of whom had only agreements with the landowners.

In such a business it must often be necessary to take possession of and realize the security, and it was essential that the securities should in every case be sufficient to provide for principal, interest, and costs.

The payments made every year by borrowers would consist

(1) 8 D. M. & G. 835.
(2) 22 L. T. (N.S.) 839.
(3) 10 Ch. D. 118.
(4) 21 Ch. D. 519.

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partly of interest and partly of principal; and I agree with the expert witnesses who say that it would not be proper to treat the proportion of interest as being invariable. In the case of each loan the first payment would include the full interest to that time. The rest would be principal, and the next payment would include interest only on the balance of the principal, and so on, the interest being thus diminished after every payment which reduced the principal of the loan. [His Lordship then read the articles of association of the company material to the first charge down to the 121st, and continued:—]

Having listened with attention to all the arguments addressed to me on the meaning of the word "realized" in article 121, which provides that "no dividends shall be paid except out of the realized profits arising from the business of the company," I must say that my opinion has never wavered for a moment. If there were nothing else than what I have read I should hold without hesitation that "realized" must there have its ordinary commercial meaning, which, if not equivalent to "reduced to actual cash in hand," must at least be "rendered tangible for the purpose of division." The article is in a negative form. It is a prohibition against payment, and against the payment of dividends except out of realized profits arising from the business of the company. The precise thing intended to be prohibited is the payment of dividends in respect of "estimated" profits as distinguished from "realized." The meaning of the word in this article is the direct converse of the word "estimated." This is my conclusion from the language of art. 121 itself. It is confirmed, I think, by the next article, the 122nd, which is worded thus:—[Here his Lordship read that article, and continued:—]

The reserve fund contemplated is clearly a realized fund which can be invested, and the direction to invest it is imperative, and if there could be any reasonable doubt as to the meaning of art. 121 this would remove it. The dividend is payable out of the residue of the realized profits after setting apart and investing a portion of them.

The suggestion that the word "realized" may be rejected when it is the emphatic word in the article, or that it means no more than "real profits honestly earned," I cannot accede to.

There is no dispute about what the directors did and omitted to do. They never submitted to any general meeting an account of income or expenditure, so that a just balance of profit and loss might be laid before the meeting as directed by art. 105. No profit and loss account was ever made at all.

I have before me the reports and balance-sheets from the commencement of the company which were presented to the general meetings. I believe that there is no substantial difference between them. Taking the first, from the registration of the company to the 12th of March, 1867, the report states that the net profit in the financial year which they had to deal with was £392 11*s.* The balance-sheet shews how this was arrived at. On the one side there is a single entry: "The present value of repayments on mortgages held by the company for sums advanced to borrowers, £6293 19*s.* 11*d.*" On the other side are entered the amount of paid-up capital, the amount of money borrowed, certain proportions of the preliminary and management expenses, some of which were spread over several years, a dividend to the shareholders at 7½ per cent., and then a balance which is stated to be carried forward, but was not in fact carried forward, the sum of these amounts being equal to the estimated sum on the other side. And precisely the same operation was repeated every year, there being no attempt to form any reserve fund, no provision for possible bad debts, losses, or expenses, except that they did not in any year divide the whole of the estimated profits, but left an imaginary balance, which, of course, could neither be realized nor invested.

Now the basis of this estimate in every case was an assumption that everyone of the securities on which the company were advancing money was ample to provide for principal, interest and costs in respect of the advance. And for this they had nothing but the assurance of the surveyor and secretary, Mr. *Galpin*. He it was also who estimated, according to the 5 per cent. table, the present value of the instalments which each mortgagor had to pay. The auditors neither checked the valuation of the securities nor the actuarial estimate of the mortgagors' repayments, and yet the directors, who were forbidden by their articles to pay any dividends, except out of realized profits, paid every dividend out

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of whatever moneys they happened to have in hand, which has been called in the argument the floating capital, and never attempted in any report or balance-sheet to distinguished realized profits from the estimated profits which they thus purported to divide, or to ascertain out of what fund the dividends were actually paid.

It has been argued that this was done *bonâ fide*, and that where directors in good faith have made an error in the computation on which their balance-sheets are founded, the Court will not lightly visit them with the consequences of a *bonâ fide* mistake. I confess I hardly know what is meant by *bona fides* in such an argument. I inquired whether there was any evidence that the directors had considered the meaning of the articles or had taken any advice upon them. There is no suggestion that they ever did so. There is nothing obscure or difficult in the construction, and it seems to me incredible that any man of business could suppose that this course of proceeding was a division of realized profits.

I adopt the language of the late Master of the Rolls in *In re National Funds Assurance Co.* (1): "A man may not intend to commit a fraud, or may not intend to do anything which casuists might call immoral, and he may be told that to misapply money is the right thing to do, but when he has the facts before him —when the plain and patent facts are brought to his knowledge— as I have often said, and I say now again, I will not dive into the recesses of his mind to say whether he believed, when he was doing a dishonest act, that he was doing an honest one. .... It is impossible in a Court of Justice to call a particular act a *bonâ fide* act simply because a man says that he did not intend to commit a fraud. .... When a man misappropriates money with a knowledge of all the facts, I cannot allow him to say that he is not liable simply because somebody or other told him that he was not doing wrong, or that somehow or other he convinced himself that he was not doing wrong."

On this head it is somewhat important to observe that instances have been given of the so-called valuations of *Galpin* on which the directors relied. In many cases they were no more than a simple statement of the amount which he thought might be

(1) 10 Ch. D. 118, 128.

advanced upon the particular security, and when it is remembered that a very large number of these securities were mere builders' agreements, it is very difficult to believe that the directors acted in good faith in relying upon *Galpin*, or in declaring dividends on the theory that every security was of ample value.

Another matter seriously affecting the question of the good faith of the directors occurred thus. In November, 1881, a committee was appointed to consider the cause of the overdraft at the bank. Upon this committee, Messrs. *Cavill* and *Wheeler*, two of the Respondents to this summons, appear to have acted. They reported in February, 1882, that a large quantity of property had fallen into the company's hands, of which they only received the rent, instead of the repayments, in respect of the money originally advanced thereon; and that a portion of such property was unproductive from being unoccupied, which arose in many cases from the property being unfinished. This property was valued by Messrs. *Wheeler* and *Galpin* separately at £82,900 or thereabouts. I am informed that it stood in the company's books at a much higher figure, and that, after these valuations a dividend for the year was declared and paid, not upon the value of the properties as ascertained by actual valuation, although the directors' attention had been thus pointedly drawn to the matter, but upon the larger value contained in their books. If this was mere carelessness it was carelessness of a description so gross as, in my opinion, to make the good faith of the directors, to say the least of it, extremely questionable.

As they never in any way distinguished income from capital, or realized from estimated profit, and as they used the floating capital of the company for the actual payment of these dividends, in my opinion, even supposing that their estimate of possible profits was in any sense legitimate, they took upon themselves, by a deliberate disregard of the prohibition in the articles, the risk that these estimated profits might never be realized, and that the capital so employed could not be replaced. In short, they have paid all dividends out of capital, on the chance that profits might be realized sufficient to justify such payments, which is precisely what the articles expressly forbid to be done.

I have said enough to shew that the risk that such estimated

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profits might not be realized would seem to any prudent man of business a most serious one. It might easily have been anticipated that a company like this, having the command of large sums of money which they were eager to lend for the purpose of encouraging building in the city of *Oxford*, would stimulate that branch of industry to such an extent as greatly to depreciate building property, and this was what actually occurred. No provision was made for the periodical depressions in the value of property to which this country has always been subject, and, if this course of proceeding had been justified by the articles, it would have been a most improvident and reckless mode of carrying on the business of such a company. But when I find that instead of being so authorized it was explicitly forbidden, it seems to me that when the company has been brought to ruin the directors must answer for so deliberate a breach of trust.

This summons is dated the 19th of February, 1884. It has been amended by striking out the whole of the original summons except the last line, which asks for costs, and inserting as a rider a new summons, including the original claim modified in amount, and other claims not mentioned in the original summons. It came on in my Chambers on the 21st of June last, and was then adjourned into Court. A great mass of evidence has been accumulated by affidavits and cross-examination on both sides. Much of this relates to matters more or less irrelevant, and little of it has been of any use for the purpose of the question argued before me. But it would be disastrous indeed if, after two and a half years of investigation and all this costly litigation, I should find myself obliged to send the matter to Chambers, and invite further delay and an increase of these costs by directing inquiries.

The evidence stands in this way: An accountant named *Haines*, who has been in practice for eighteen years since completing his articles, eight of which he spent in the office of Messrs. *Cooper Bros.*, of *London*, has been employed by the liquidator since 1883 to prepare what he calls a deficiency account, shewing minutely the items comprising the losses and expenses of the company from the commencement of the operations. Under these instructions he has prepared a very bulky document,

which is the exhibit marked "J. Y. C.," as to which he says that such of the figures contained therein as are not calculations were extracted by him from the books of the company, with the assistance of a clerk named *Hollingsworth*, who worked beside him. And he says that the said calculations and extracts are correctly made and are true and correct in every particular. In a further affidavit, filed on the 13th of April, 1886, he says that "J. Y. C." is only incomplete in that there has not been an exact adjustment between the total of the amounts of advances and repayments, and the balance outstanding at the date of the liquidator's appointment, but that for the purposes of a profit and loss account it is substantially complete and accurate, and that there is only a difference of a few hundred pounds in the balance out of a total of more than £400,000.

I am told that no attempt has been made to impeach that account or the evidence of Mr. *Haines*, as to its accuracy, although of course the books of the company might be referred to, and there has been ample time and opportunity to investigate it, and accountants have been employed, and have given evidence on behalf of the directors upon this summons. It is usual for the Court to act upon evidence of this kind, because of the impossibility of investigating long books of account in open Court.

Mr. *Cooper*, the accountant who has given evidence in this case on behalf of the Respondents, in the 11th page of his cross-examination seems to admit the substantial accuracy of "J. Y. C.," except that it makes the mistake of apportioning the instalments paid by the mortgagors between principal and interest by attributing to interest the same amount in the case of every instalment. Now, another accountant named *Yeats*, taking the document "J. Y. C.," has compiled from it another document "J. Y. B.," and from this he has made a table called "J. Y. A.," in which he shews the amount of interest in every year received since the formation of the company, which was applicable to the payment of dividends, after providing for the necessary outgoings; and that brings out as a result that the total amount of dividends actually paid beyond what such interest would provide for, was £59,156 4*s.* 6*d.* This, however, was inaccurate, because in his computation he had committed the error which I have

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mentioned of treating the interest portion of such repayment as an invariable sum. This error has been corrected in an exhibit marked "J. Y. V.," the result of which is that the overpayments are reduced to £44,433 4*s.* 6*d.* This amount is arrived at after crediting all interest received in every year without setting apart any portion of it as a reserve fund to answer contingencies. The computation, therefore, if the principle is right, is as favourable to the directors as possible.

I think I am bound to accept the evidence as sufficient proof of the amount, and the only question remaining is whether it is right to treat the interest portion of the repayments actually received after providing for the current expenses and outgoings, as the only realized profit applicable to payment of dividends.

In my opinion that is right. Taking a single advance of, say of £1000 at 8½ per cent., repayable principal and interest by equal half-yearly instalments extending over fourteen years, if every instalment were punctually paid it would be the duty of the directors to treat a sufficient part of each instalment as the interest on the advance, or the unpaid portion of the advance, to that time. This amount, after providing for all current expenses and outgoings, and setting apart a sufficient sum to meet contingencies, would be properly applicable to pay a dividend; and it would be improper to pay any dividend in respect of an instalment not actually paid, because until paid no part of that instalment could be treated as realized profit.

I must, therefore, declare that the several Respondents who were directors at the time when these dividends were respectively declared, are liable for the amounts improperly paid away, as shewn by "J. Y. V.," in each year of their directorship. The liability as between the directors liable will be joint and several, and as it is founded upon a breach of trust committed by them, it must be with interest at 4 per cent., which is the usual rate in such cases.

Those who were directors from the commencement will be jointly and severally liable for the whole. The others will be liable with them jointly and severally for such of the dividends as were declared after their election on the 2nd of May, 1876. The interest in each case must be calculated from the payment

of the dividend, which, to prevent expense, may be taken to be a certain time—say three months—after the declaration of each dividend. With these directions the amount can easily be calculated from "J. Y. V.," and I will allow this to be done by affidavit and the amounts stated in figures in the order. The payment must be directed to be made within six months from the date of the order.

There must be in the order a reservation of the rights of the directors, if any, to recover from the shareholders or any of them.

Two other questions were raised, one whether the directors must not repay the remuneration they respectively received with interest.

By the 61st article it was thus provided: "The directors shall be entitled to such remuneration for their services as the company in ordinary or extraordinary general meeting may determine, provided that no remuneration shall be paid to the provisional or other directors until a dividend at the rate of 7½ per cent. shall have been paid to the shareholders. Such last-mentioned remuneration shall be divided among the directors in such manner as they may at any meeting of the board resolve on."

According to "J. Y. V." in no year could a dividend at the rate of 7 per cent. have been declared, even though no sum had been retained for a reserve fund. The event, therefore, never happened on which the directors could become entitled to remuneration. Even if it had occurred in one year, I could not read this article as authorizing remuneration to the directors for all future time, but only for that one year.

It is suggested that the shareholders in general meeting authorized the remuneration. The answer is that they did so not knowing the facts. It is said that if they had known, they might possibly still have given the directors the same remuneration. That, however, would be a mere speculation. They did not in fact do so.

Each director must be ordered to repay the amount received by him with interest at 4 per cent. from the several times when the sums were received. Probably these amounts can be agreed, or, if not, proved by affidavit. They must be repaid within six months.

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The only other point is as to an additional remuneration which the directors on the 16th of March, 1880, seem to have voted and afterwards paid to themselves, without the assent or knowledge of the shareholders. This was taken in the form, I understand, of a commission on purchases and sales. This commission does not appear in the reports or balance-sheets, but it is entered in the books of the company. I have heard no excuse for this. The directors must be declared jointly and severally liable to repay this amount, with interest at 5 per cent. from the respective times of payment. I believe the figures are ascertained, and with the assistance of an affidavit computing the interest the amount can be stated in the order.

These several payments must be made to the liquidator within six months, who must forthwith pay the same into Court.

The directors who are Respondents must pay the costs of the summons, which must be taxed, and I hope that the Taxing Master will disallow the costs of all irrelevant evidence.

An appeal from this decision was presented by the Respondents the directors. Before the appeal came on for hearing, Mr. Justice *Stirling*, on evidence as to the means of the Respondents respectively, sanctioned a compromise of the society's claims against them, upon payment by them to the liquidator of the society of sums amounting in the whole to about £21,000; and this compromise was carried into effect in the month of June 1887.

Solicitors: *Speechly, Mumford & Landon; Johnson, Budd & Johnson; Philpot & Sons; Collis & Mallam*, agents for *George Mallam, Oxford.*

W. W. K.

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March 14, 15, 16.

[1886 G. 210.]

*Lease—Lessor and Lessee—Power of Leasing—Covenant for Renewal—Sanction of Court—"Best Rent"—Specific Performance—Damages—*12 & 13 *Vict. c.* 26 [*Revised Ed. Statutes, vol. x., p.* 605]; 13 & 14 *Vict. c.* 17 [*Revised Ed. Statutes, vol. x., p.* 797].

A covenant for renewal in a lease executed by a lessor under a power of granting leases in possession at the best rent is good, and may be enforced against the lessor, provided that, at the time for its performance, the new lease reserves the best rent that can then be obtained, and contains only stipulations then authorized by the power.

But if at the time when performance of the covenant is claimed, the stipulated rent is not the best rent, the lessee is not entitled either to specific performance or damages, even though the original lease had been sanctioned by the Court in the presence of all the beneficiaries.

A private Act of 1828 relating to a testator's real estate empowered his trustees to grant building leases in possession not exceeding seventy-five years at "the best yearly rent." In 1860, under an order in certain suits relating to the estate, the surviving trustee, in pursuance of the power and with the approval of the Judge (some of the *cestuis que trust* being also before the Court and others being represented by trustees) demised certain copyhold land to a gas company (then in occupation under an agreement for the lease, which agreement had also been sanctioned by the Court) for thirty years at the yearly rent of £30, the lessor covenanting to renew at the end of the term for a similar term at the like rent, if the lessees previously signified their desire for renewal by notice in writing delivered to the lessor "his heirs or assigns, or left at his or their usual place or places of abode." The lessor had obtained from the lord of the manor of which the copyhold land was held a license to grant leases covering fifty-one years from the date of the lease.

Under the agreement for the lease and before the lease was executed, the company spent a considerable sum in erecting a large purifying-house on the land.

Before the expiration of the lease the solicitors to a new gas company, the successors to the original lessees, gave notice in writing to the solicitors to the then trustees, the original lessor having died, of the lessees' desire for renewal, but the lessors declined to renew on the grounds (amongst others) that, as the fact was, the value of the property had very largely increased, that the original rent was therefore not now "the best yearly rent," and that the covenant for renewal was not authorized by the power.

In an action by the company against the present trustees and their *cestuis que trust* claiming specific performance of the covenant or damages:—

Held, (1) that the covenant was not *ultrà vires*; but (2) that specific

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performance of it could not be enforced, as the original rent was not now the best rent; (3) that the Act 12 & 13 Vict. c. 26, enabling the Court to remedy defects in leases in certain cases, did not apply to the present case, there having been no "mistake or inadvertence" on the part of the lessor, nor "ignorance of title on the part of the lessees;" and (4) that on the doctrine of *Bain* v. *Fothergill* (1) the lessees could not recover damages for a breach of covenant arising from infirmity of title.

Quære, whether giving notice for renewal to the lessors' solicitors was a proper compliance with the terms of the lease as to notice.

BY the *Randall Estate Act*, 1828 (9 Geo. 4, c. xxxiii.),—being an Act for enabling the trustees of the will of *William Randall* the elder, deceased, to grant building leases of part of the freehold, copyhold, and leasehold estates thereby devised, and leases of certain houses situate in, amongst other parishes, the parish of *Lambeth*, in the county of *Surrey*—it was enacted (sect. 1) that it should be lawful for the trustees of the will therein named (being two in number) and the survivor of them, to demise or lease any part of the estates for any term of years, not exceeding seventy-five years from the making thereof, on repairing, improving, or building leases, "so as there be reserved in every such lease or demise (except in those cases in which a peppercorn rent may be reserved, according to the provisions hereinafter contained,) the best yearly rent to be incident to the reversion expectant on the determination thereof, that can be reasonably had or gotten for the same:" and after prescribing the covenants and powers to be inserted in any such lease, the section concluded, "and so that in respect to such of the said hereditaments and premises as are copyhold or customary, the term or terms so to be granted may, by license, custom, or otherwise, lawfully be granted of the same hereditaments without incurring a forfeiture." The Act did not in terms authorize the insertion in any lease of a covenant for renewal.

Sect. 3 also empowered the trustees, or the survivor of them, to enter into contracts for granting leases pursuant to the powers and subject to the restrictions thereinbefore contained.

By an indenture of lease made the 5th of December, 1860 (in pursuance of an order of the Court of Chancery, dated the 23rd of April, 1859, made in a cause of *Lett* v. *Randall* (2) and six other

(1) Law Rep. 7 H. L. 158.

(2) See 10 Sim. 112; 3 Sm. & Giff. 83; 2 D. F. & J. 388.

causes supplemental thereto, the lease being approved by the Judge), between *Thomas Lett*, the surviving devisee in trust under the will of the said *William Randall*, of the one part, and the *London Gas Light Company* of the other part, it was witnessed that, in pursuance of the power contained in the *Randall Estate Act*, the said *Thomas Lett* demised unto the *London Gas Light Company*, their successors and assigns, a piece of ground on the south side of *Gloucester Street, Vauxhall Walk*, in the parish of *St. Mary, Lambeth*, in the county of *Surrey*, with the purifying-house or other buildings thereon, then in the occupation of the company, to hold unto the company from the 25th of March, 1856, for the term of thirty years at the yearly rent of £30, payable quarterly. And the lease contained covenants by the company to repair, not to commit waste or suffer any improper light or other encroachment to be made upon or against the premises, to insure, or to reinstate the premises in case of fire. Then, after reciting that the land demised was copyhold of the manor of *Kennington* and subject to an arbitrary fine on death or alienation, and that the improved annual value of the land might, during the continuance of the said term, be greatly increased by reason of buildings to be erected thereon by the company, the company thereby covenanted to pay during the term to the lord of the manor all fines payable beyond the ordinary fine payable according to the custom of the manor if the land remained at the annual value of £30 only. And the said *Thomas Lett* covenanted with the company, their successors and assigns, that in case the company should be desirous of taking a new lease of the premises after the expiration of the said term, and should "at least six months before the expiration thereof, signify such their desire by a notice in writing to be delivered unto the said *Thomas Lett*, his heirs or assigns, or left at his or their usual place or places of abode," he, the said *Thomas Lett*, his heirs or assigns, would, at or before the expiration of the said term, forthwith "execute unto them, their successors and assigns, a new and fresh lease of all and singular the premises hereinbefore demised for a similar term of thirty years, to commence from and after the expiration of the present term hereby granted at and under the like rent, and with and subject to the like costs, provisoes, and agreements as

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are herein contained, excepting only this present covenant or agreement for renewal."

On the 1st of July, 1883, the *London Gas Light Company* became amalgamated with the *Gas Light and Coke Company*, the present Plaintiffs.

Thomas Lett, the lessor, died on the 23rd of March, 1865, having by his will appointed the original Defendants in this action his trustees and devised to them his trust estates.

The Defendants were thus the present trustees of the will of *William Randall* the elder.

It also appeared that they were the executors of *Thomas Lett*, though this fact was not stated in the statement of claim.

On the 18th of May, 1885, the Plaintiffs' solicitors wrote a letter to the Defendants' solicitors, stating that the Plaintiffs were desirous of renewing the lease, and asking that the letter might be taken as notice from the Plaintiffs to the Defendants; and on the 1st of June, 1885, the Defendants' solicitors wrote to the Plaintiffs' solicitors stating that they were acting for the Defendants, the trustees of the will of *Thomas Lett*, and on their behalf acknowledged the receipt of the letter of the 18th of May; they further stated that they did not know whether the Defendants had power to grant the new lease, and that in any case the fresh lease could not be granted until the present one had expired.

Subsequently, in December, 1885, the Plaintiffs' solicitors received a letter from the solicitors to several of the beneficiaries of the *Randall* estate, stating that, so far as the beneficiaries were concerned, they would not renew the lease as the property would in a few months be offered for sale. Further correspondence then ensued between the solicitors to the various parties with reference to a renewal of the lease, and ultimately, on the 29th of January, 1886, the surveyors to the *Randall* estate served a notice upon the Plaintiffs, by leaving it on the demised premises, stating that they, the surveyors, had been instructed by the then owners of the *Randall* estate to take empty possession of the premises on the 25th of March, 1886, being the day on which the lease would expire.

Thereupon, on the 30th of January, 1886, the Plaintiffs issued the writ in this action claiming specific performance of the

covenant for renewal contained in the lease: in the alternative, damages for breach of the covenant; and an injunction to restrain the Defendants from enforcing the notice of the 29th of January, with consequential relief.

In their statement of defence the Defendants alleged that the lease was not in all respects in accordance with the Act under which it purported to have been granted: that the annual rent of £30 thereby reserved was not, on the 25th of March, 1886 (the date of the expiration of the lease), and was not now the best yearly rent which could reasonably be gotten for the demised premises: that the said Act did not authorize a reversionary lease, and the lessor's covenant for renewal was *ultrà vires*, and the original lessees and the Plaintiffs who claimed as assignees, had, at the time of the lease, and of the alleged assignment thereof, notice and knowledge of all matters contained in the Act and lease respectively: that, by orders made in *Lett* v. *Randall*, it was declared that the testator *William Randall* the elder died intestate as to his copyhold estate, except as to the life interests by his will given to his children in parts thereof, and that, subject thereto, such copyhold estate vested in his son *William Randall* the younger, who died in September, 1854, and such hereditaments (including the hereditaments comprised in the lease) were, at the date of the order of the Court directing the making of the lease, subject to the will of the said *William Randall* the younger: that the persons beneficially interested in the copyhold hereditaments comprised in the lease on the 23rd of April, 1859, the date of the said order directing the making of the lease, were not all before the Court at the making of such order, or were not bound thereby, some of them being then infants, under disability or unborn, and such persons now objected to the granting of the new lease: that the property comprised in the lease was now vested in equity in persons claiming under the will of *William Randall* the younger, none of whom were Defendants to the present action, and of whom some were under disability and the rest opposed the granting of a new lease as not being for the benefit of such persons, and the Defendants were bare trustees of the property; that the lessees and their successors,

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the Plaintiffs, had committed breaches of covenant: that the lessees or their successors had sub-let the premises, at a considerable profit rental, to one *Cookson*, a dust contractor, who had for some time past used and was still using the premises in such a way as to damage them and be a nuisance to the tenants of the adjacent parts of the *Randall* estate, and that the extended lease was not required for the purposes of the Plaintiff company or their business, but for the purposes of the said dust contractor, who was the real Plaintiff in this action and had given the Plaintiffs an indemnity against the costs of it: that the license of the lord of the manor was requisite to the granting of the new lease, which license had not been obtained: and that the Plaintiffs did not deliver or leave a notice demanding a new lease within the time or, in the manner, or to the persons, or at the places required by the original lease, so as to entitle the Plaintiffs to a new lease.

Under an order for particulars the Defendants furnished the names and addresses of the beneficiaries interested in the property, and also of the breaches of covenant alleged in the defence. In their particulars of the latter the Defendants said that the demised premises had for several years past been in a very bad state of repair and neglect generally, and in particularly as regarded the roofs, pavements, and painting; that the purifying-house had been turned into stables, and the structure thereof altered, so that the building was no longer fit to be used as a purifying-house, and that the whole premises were in a foul and filthy condition and consequently greatly injured: that on one side of the premises the lessees had allowed large lights to be opened, which had diminished the value of the property: that the buildings had not been insured; and that the nuisance complained of consisted of permitting and keeping upon the premises dust, rubbish, manure, and filth.

In their reply, the Plaintiffs joined issue on the defence, and referred to the order made by Vice Chancellor *Stuart*, in *Lett* v. *Randall* and the other suits, on the 23rd of April, 1859, whereby an agreement dated the 1st of May, 1856, between the said *Thomas Lett*, the Plaintiff in that action, and the *London Gas*

Light Company, for a lease of the premises, was ordered to be carried into effect, the lease to be settled by the Judge. The agreement contained a provision for renewal in the same terms as the covenant in the lease. The lease was, as above stated, duly approved by the Judge, and executed on the 5th of December, 1860. The Plaintiffs submitted that the Defendants, as the assigns of *Thomas Lett*, were now bound by that order.

The Plaintiffs then went on to allege that the annual rent of £30 was, at the date of granting the lease, the best yearly rent that could be reasonably gotten, and they submitted that the question of what was the best yearly rent that could, on the 25th of March, 1886, or now, be reasonably gotten, did not arise in the present action, though they denied that the annual rent of £30 was not such best rent. They also submitted that, as the term for which *Thomas Lett* covenanted to grant a new lease did not exceed the seventy-five years authorized by the *Randall Estate Act*, he was able to grant either one lease for the whole term of seventy-five years, or a lease for a part of such term with a covenant to renew the same, at the option of the lessees, for the remainder of such term, provided the whole term did not exceed seventy-five years. They also denied that at the time of the assignment of the lease to them they had, either in fact or in law, any notice or knowledge of the contents of the Act, which was a private Act: that they, the Plaintiffs, were no parties to *Lett* v. *Randall*, and had no knowledge of and were not bound by the orders made in that or the other suits: that all parties claiming through or under *William Randall* the younger, who was one of the persons on whose petition the *Randall Estate Act* was passed, were bound by any lease granted under that Act: that all proper parties were before the Court when the order authorizing the granting of the lease was made, and that for the purposes of the present action the trustees of the *Randall* estate sufficiently represented the beneficiaries who were numerous, or that, if necessary, some person should be appointed to represent them. They also denied the alleged breaches of covenant, and submitted that the receipt for rent due from them up to the 25th of March, 1886—which rent was in fact paid to the surveyors of the *Randall* estate, who gave the Plaintiffs the receipt

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for the same,—constituted a waiver of any question of breaches, and they further relied on the *Conveyancing Act*, 1881. They also denied the alleged nuisance, and submitted that under the lease any license required from the lord of the manor should be obtained by the Defendants. They also insisted that they had given a proper notice demanding a new lease.

By their rejoinder the Defendants denied that they had been paid all rent due up to the 25th of March, 1886 or that they had given a receipt for the same, and alleged that, if the Plaintiffs had paid such rent, they had done so without the Defendants' knowledge or assent, and without any authority on the part of the persons receiving it to waive the breaches of covenant: and the Defendants joined issue on the reply.

Subsequently the Defendants, in particulars delivered by them under an order in the action, stated that the only rent not paid by the Plaintiffs under the lease was the quarter's rent due up to the 25th of March, 1886.

Upon the action coming on for trial his Lordship directed it to stand over in order that one or more of the beneficiaries might be added as parties to represent the others.

Four of the beneficiaries were accordingly added, and on the action again coming into the paper for trial his Lordship directed that these four should represent all the beneficiaries for the purposes of the action.

The trial was then proceeded with.

From the evidence it appeared that between the dates of the agreement and the lease of 1860 the Plaintiffs' predecessors had, in pursuance of the agreement, expended a sum of about £2000 in the erection of the large purifying-house mentioned in the lease, and that since the date of the lease the value of the land for building purposes had very greatly increased, it being situated close to the *Thames Embankment*: that the rental value of the land itself without any buildings upon it, if laid out in building sites, was now about £120 a year, and that *Cookson*, the dust contractor, was now in fact paying a rent of £150 a year for the use of the premises as a dust-yard, and that he had converted the purifying-house into rough stabling for his horses and carts and that if the premises were put into proper repair a similar

rent could be easily obtained from carmen and others. It also appeared that at the time the lease was granted the lessor had obtained from the lord of the manor a license to grant leases which would cover a period of fifty-one years from the commencement of the term.

Marten, Q.C., and *Willis-Bund*, for the Plaintiffs :—

We submit that under the *Randall Estate Act* the trustees, in granting a lease for thirty years, had power to covenant to renew for a further term of thirty years. The lease of 1860 should be treated as, what it is in substance, a lease for one term of sixty years at a fixed rent, determinable by the lessees at the end of the first thirty years, a form of lease authorized by the power. Not having exercised our option of determining, the lease is still a subsisting lease, and at the original rent. It is clear that trustees with power to grant leases not exceeding a certain term may grant a lease for that term determinable at the end of a portion of it: *Edwards* v. *Millbank* (1). The covenant is an absolute covenant for renewal; the Court cannot now import a stipulation into it that "the best rent shall be reserved." Both parties entered into the contract with their eyes open, knowing perfectly well that in consequence of the expenditure on the property it would increase in value. The words "best rent" in the power of leasing contained in sect. 1 of the Act must mean the best rent at the time this lease for sixty years commenced, and not at a subsequent period. The form of lease was expressly sanctioned by the Court in the presence of all parties, any beneficiaries who were not personally before the Court being represented by the trustees under rule 9 in sect. 42 of the *Chancery Amendment Act* (15 & 16 Vict. c. 86), and, therefore, it cannot now be questioned. If there was in fact any defect in the lease it is cured by the acceptance of rent, which operated as a confirmation of the lease: 12 & 13 Vict. c. 26, s. 3; 13 & 14 Vict. c. 17, s. 2.

As to our notice requiring renewal, we submit it was a sufficient compliance with the terms of the lease, for our notice was accepted by the solicitors to the trustees expressly on behalf of their

(1) 4 Drew. 606.

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clients. Service at the "place of abode" is sufficiently effected by service at the address for service; but any defect in the notice has been waived by the subsequent receipt for rent. This being, as we contend, a lease for sixty years, the lessors cannot exercise their right of re-entry or forfeiture for breach of covenant without first giving us notice specifying the breach: *Conveyancing and Law of Property Act*, 1881, s. 14. If the contract cannot be specifically performed, we ask for damages, as claimed, and we ask leave to amend the statement of claim, if necessary, in order to insert more distinct allegations on this point.

Hemming, Q.C., and *Maurice Lloyd*, for the Defendants, the trustees:—

The license from the lord of the manor only extended to a lease for fifty-one years, and in any case it is impossible to treat this as a lease for sixty years. If, under a power to grant leases to take effect in possession, a man grants a lease for a certain term with a covenant for renewal the covenant is bad: *Harnett* v. *Yielding* (1). In such a case the lessee cannot tack the further term on to the original term so as to make the original lease equivalent to a lease for the longer period. The option to take a renewed lease, that is, a lease which shall take effect in reversion and not in possession, as required by the power, is certainly bad: *Doe* v. *Lady Cavan* (2); *Sugden* on Powers (3); *In re Farnell's Settled Estates* (4).

Again, it is well settled that, where the power is to grant a lease at the "best rent," the rent reserved by a lease under the power must be the "best rent" at the time the lease is executed, otherwise the lease is bad: *Doe* v. *Bettison* (5); *Dowell* v. *Dew* (6); *Sugden* on Powers (7). Here it is proved conclusively that the old rent is not now the best rent, or even a fair rent; for the best rent does not necessarily mean the highest rent: *Dyas* v. *Cruise* (8). The Acts 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17, do not apply to such a case as this, but only where there

(1) 2 Sch. & Lef. 549.
(2) 5 T. R. 567.
(3) 8th Ed. pp. 763, 764.
(4) 33 Ch. D. 599.
(5) 12 East, 305.
(6) 1 Y. & C. Ch. 345; 7 Jur. 117.
(7) 8th Ed. p. 788.
(8) 2 J. & Lat. 460.

has been "mistake or inadvertence" on the part of the lessor, or "ignorance" by the lessee of the lessor's title.

We do not admit that all the beneficiaries were duly represented when the lease was sanctioned; but if they were, the sanction of the Court to the covenant does not make it enforceable if at the time when specific performance is demanded a lease in accordance with it would be *ultrà vires* the trustees.

Again, the evidence shews that the land is now practically useless for the purposes of the Plaintiff company, and their Act authorizes them to use it for the purposes of their undertaking, and for no other purpose: they only require the land in order to sublet it at any improved rent, which is not part of their business and therefore *ultrà vires* the company. In allowing the purifying-house to be altered, and the premises to be used for purposes inconsistent with their lease they have made themselves liable for waste: *Bacon's* Abr., "Waste" (C) (1). The Court will not relieve them against the legal consequences of their breaches of covenant: *Gregory* v. *Wilson* (2). The covenant to renew, being a contract by trustees to grant a lease which turns out to be beyond their powers, cannot be enforced: *Fry* on Specific Performance (3).

Again, the notice for renewal was not given in conformity with the requirements of the lease: notice to our solicitors was not sufficient: *Saffron Walden Second Benefit Building Society* v. *Rayner* (4). As to the receipt for rent being a waiver of any defect in the notice, the mere receipt of rent does not raise the presumption of waiver: *Doe* v. *Batten* (5). In point of fact rent was received not by us but by our agents, who had no authority to waive a defective notice: to bind the principal in such a case it must be proved that the agent had express authority: *Doe* v. *Birch* (6).

[They also cited *Russell* v. *Watts* (7) upon the question of the Plaintiffs allowing the property to be affected by the opening of new lights.]

(1) Vol. viii. 7th Ed. p. 382.
(2) 9 Hare, 683.
(3) 2nd Ed. p. 177–8.
(4) 14 Ch. D. 406.
(5) 1 Cowp. K. B. 243.
(6) 1 M. & W. 402.
(7) 10 App. Cas. 590.

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Renshaw, Q.C., for the Defendants, the beneficiaries:—

The notice for renewal, to be effectual, should have been given according to the exact words of the lease, and have been served upon the trustees themselves: *Hogg* v. *Brooks* (1). As to the claim for damages, if a plaintiff has no equity to come for specific performance—as, I submit, is the case here—he cannot maintain an alternative claim for damages: *White* v. *Boby* (2); *Hipgrave* v. *Case* (3). Again, this is a case of defective title: the trustees, in the discharge of their duty towards their *cestuis que trust*, find themselves unable to grant the lease asked for; and it is settled that in such a case damages for non-performance of contract cannot be recovered: *Flureau* v. *Thornhill* (4); *Bain* v. *Fothergill* (5).

In any case the present trustees cannot be personally liable for damages, there being no privity of contract between them and the company. The persons, if any, to be sued are the legal personal representatives of *Thomas Lett*, the original lessor, and the trustees are sued only as assigns of the lessor bound by his covenant.

Marten, in reply.

KAY, J.:—

The action in this case is brought by the *Gas Light and Coke Company* for specific performance of a covenant contained in a lease dated the 5th of December, 1860, to renew that lease for a term of thirty years from the 25th of March, 1886, and, in the alternative, for damages for breach of the covenant, and an injunction and consequential relief. The lease was granted by one *Lett* as surviving trustee of the will of *William Randall*, the elder. It was a lease for thirty years, and was granted under the powers conferred by a special Act of Parliament relating to the *Randall* estate.

The term expired on the 25th of March, 1886. In the meantime *Lett*, the trustee and lessor, had died on the 23rd of March,

(1) 15 Q. B. D. 256.
(2) 26 W. R. 133.
(3) 28 Ch. D. 356.
(4) 2 W. Bl. 1078.
(5) Law Rep. 7 H. L. 158.

1865. The principal Defendants are the executors and trustees of his will, and they are also trustees of the will of *William Randall*, the elder. On the 18th of May, 1885, a notice requiring renewal was given to the solicitors of these Defendants, the trustees, which was duly acknowledged by the solicitors.

Various defences have been raised, of which the most important one is that the covenant cannot now be specifically performed, because the rent reserved by the lease, which was only £30 a year, was not the best rent at the time when that lease expired, and when the renewal was demanded. It seems that the land is copyhold, and that at the time when the lease was granted, the lessor had obtained a license from the lord of the manor to grant leases which would cover a period of fifty-one years only from that time; consequently a lease could not then have been granted for more than fifty-one years, without endangering a forfeiture of the copyhold estate.

Upon the law applicable to this state of things there has not been much controversy, and I think it is quite settled by authority. In the private Act of Parliament which conferred this power of leasing, the power conferred was to grant building leases for a term not exceeding seventy-five years, but it was limited by this proviso: "So that in respect of such of the said hereditaments and premises as are copyhold or customary, the term or terms so to be granted may, by license, custom, or otherwise, lawfully be granted of the same hereditaments without incurring a forfeiture." Accordingly, under that power so limited no lease could have been granted for more than fifty-one years from the year 1860. That is the term for which a lease could have been obtained. There is in this Act of Parliament also an express clause giving power to contract for leases; and, therefore there can be no doubt whatever that the trustee had power to enter into a contract to grant a lease. It is almost involved in that statement that he should have power to contract to grant a lease at a future day. A man does not contract to grant a lease now, he contracts to grant a lease to-morrow or next week, or next year, or at some future time. Such a contract is not a reversionary lease in any sense: it is a contract at a future time to grant a lease; and provided that, when that

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future time comes, the lease is in all respects in conformity with the power—that is, that it reserves the best rent and contains proper covenants, and so on—there is no harm in the contract; it is a perfectly good contract. So, when a lease is granted, if in the lease there is a covenant that when that lease expires the lessor will renew the lease, be it for one year, ten years, or any number of years within the power, *primâ facie* there is nothing bad in that covenant.

It is, of course, subject to this infirmity—which is common to every case of contract to grant a lease under a power at a future time—that when the time comes the rent agreed upon, and the covenants, and so on, must be such as will at that moment satisfy the terms of the power. The rent must be the best rent then, that is, when the lease is granted; so the covenants must be such covenants as ought then, according to the terms of the power, to be inserted in the lease.

That is the view of the law which seems to me warranted by common sense and completely sanctioned by authority. The cases on the subject are not very numerous, but they are these. First of all, there is the very well-known case of *Harnett* v. *Yielding* (1), decided by Lord *Redesdale* in 1805, where there was a lease for twenty-one years made by a tenant for life—undoubtedly a lease under a power, although not expressly so stated in the report—containing a contract to renew that lease by granting a further lease for twenty-one years at any time during his life. Lord *Redesdale* thought the contract was bad. He said (2): "I think Courts of Equity should never enforce such contracts, whether with a view to the party himself, or to the person entitled in remainder. In the first place, it is unconscionable in the tenant for life to execute such a lease, because it brings an incumbrance on the estate of the remainderman and puts him to litigation to get rid of it: and as to the tenant for life himself, it is compelling him to do what is to be the foundation of a future action for damages, if he die before the twenty-one years. The Court will never do this, but will leave the party at once to bring his action for damages. And I also conceive that this sort of contract, obtained by a person who knew at the time the nature of the

(1) 2 Sch. & Lef. 549. (2) 2 Sch. & Lef. 559.

title, is unconscionable in him"—that is the lessee, the person agreeing for the lease—"as he makes himself a party knowingly to that which is a fraud on the remainderman; and, under such circumstances, he has no claim to the assistance of a Court of Equity."

In the case of *Doe* v. *Bettison* (1), which was decided in the year 1810, in a lease for twenty-one years, under a power to lease for twenty-one years reserving the best rent, and so on, there was a covenant by the lessor that, in consideration of a large sum to be laid out by the lessee in the repair of the premises in the first instance, he, the lessor, would at all times during his life, at the request of the lessee, renew the lease on the same terms. The case came before Lord *Ellenborough*, who says in his judgment: "Then as to the covenant for renewal; it is said that it has a tendency to induce the lessor to run the question on the quantum of rent reserved very closely; for if he renewed at the end of twenty years from the first granting of the lease, the remainderman might have a lease fixed on him for twenty-one years from that time, reserving less than the best rent which could then have been reserved: but the answer is, that if the fact were so, the lease would be void"—that is, the new lease would be void—"and the remainderman might bring his ejectment and recover the premises." That was a case of ejectment, the ground of the action being that the lease was altogether void; but Lord *Ellenborough* did not so decide, and held that the insertion of a covenant of that kind did not make the whole lease void, and that the covenant itself was not necessarily void; but that when the time to perform it came, unless it could be shewn that the rent stipulated for was the best rent which could then be obtained, any lease granted under the covenant to renew would be bad.

Now that same point arose in the case of *Dowell* v. *Dew* (2). There, again, while a lease was in existence the lessor, who had only a power, agreed that when the lease came to an end he would grant another lease on the same terms and for the same period. It was held that the agreement was not necessarily void, and might be enforced in equity provided the effect of it was that the rent and covenants in the renewed lease were conformable with the terms

(1) 12 East, 305, 310. (2) 1 Y. & C. Ch. 345.

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of the power. The case came before Lord *Lyndhurst* in the Court of Appeal (1), who says, with reference to the argument that the power authorized only the granting of a lease in possession, "But there was nothing, I conceive, in the terms of the power to prevent the party, in whom it was vested, from agreeing beforehand to grant a lease in possession when the proper time should arrive for that purpose. In fact, were it otherwise, an agreement entered into for such a purpose before the expiration of the existing lease would be invalid. An agreement of this nature is binding, and the execution of it may, I think, be enforced by the Court, if, as in the present case, the power is still subsisting at the expiration of the existing lease." And for that he refers to *Shannon* v. *Bradstreet* (2).

That being the state of the authorities, the point came before Lord *St. Leonards* himself, the highest possible authority on this question of powers, and he thus states the law in his treatise on Powers (*Sugden* on Powers) (3). He mentions the case of *Doe* v. *Bettison* (4) and then he says: "The last case has been considered as at variance with the position laid down by Lord *Redesdale* in *Harnett* v. *Yielding* (5), where the lessor covenanted by the old lease to execute a further lease for twenty-one years, at any time during his life, at the old rent, and Lord *Redesdale* thought that covenant objectionable. In a later case in *Ireland* the Chancellor" (that was Lord *St. Leonards* himself) "observed, that he could not entirely go along with Lord *Redesdale* in that proposition, for though it would be an objection if at the time when the contract is to be performed it is not the best rent, he did not see how it was an objection if at that time the old rent was the best rent. What harm was done in such a case when the new lease is within the power?" The case he refers to is *Dyas* v. *Cruise* (6).

The authorities, therefore concur in establishing this proposition—that in a lease under a power a covenant to renew that lease at the expiration of the term is a good covenant, even though the first lease was for the full term authorized by the power; but that when the time for carrying that covenant into

(1) 7 Jur. 117.
(2) 1 Sch. & Lef. 52.
(3) 8th ed. pp. 787, 788, pl. 22, 23.
(4) 12 East, 305.
(5) 2 Sch. & Lef. 549.
(6) 2 J. & Lat. 460.

effect arrives by the expiration of the first lease, then it must be shown that the rent and covenants stipulated for are such as are the best rent and the proper covenants at that time.

Accordingly there is no doubt, and indeed it has not been seriously contested, that in this case the lease which was granted in 1860, being a lease for thirty years with a covenant for renewal for another thirty years, was a perfectly good lease, and moreover that the covenant was a perfectly good covenant. But it does not follow, that the covenant could, when the time came for enforcing it, be enforced, because circumstances might so have altered that the stipulated rent might not then be the best rent that could be obtained.

That, then, being the law of the case, the question of fact at once arises. It is asserted on behalf of the beneficiaries, who are represented separately in this case—the persons who are entitled to the benefit of the rent derived from this property—that the rent of £30 reserved by the original lease is not the best rent which could have been obtained for that property at the expiration of the lease when the Plaintiffs required the performance of the covenant to renew. Upon that point the evidence seems to me to be quite overwhelming. This property is situate on the banks of the *Thames* at *Lambeth*, and was originally taken on lease by this demise in 1860 by a company called the *London Gas Light Company*. The evidence before me satisfies me that since that time this neighbourhood, which was then comparatively unbuilt upon, has become very largely built upon. It is a matter of common knowledge that the *Thames Embankment* has since been made there, and I therefore entirely believe the statement that has been made, that the value of the land for building purposes has increased immensely since this lease of 1860 was granted. The evidence before me, which I have no reason whatever to doubt, is that instead of £30 as much as £120 a year might be obtained for this piece of land now if it were absolutely vacant land without any building upon it at all; so that the ground rent value of the land has very much increased.

Then, besides that, there is on the land a building erected by the *London Gas Light Company*, the original lessees—a very large and substantial building erected originally as a purifying-house

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for the manufacture of gas, and the present Plaintiffs, the *Gas Light and Coke Company*, have sublet this building—it being no longer used for the manufacture of gas—to a dust contractor who, using it as a rough stable, gives them £150 a year rent; and although the trustees of the estate do not desire to let it for a similar purpose, the evidence is quite convincing that, if they care to do so, they could at all times command for this land with this building upon it a rent of something like £150 a year, not merely from dust contractors, but also from carmen and other persons requiring the use of the building for storage or other similar purposes. Accordingly, as I have said, the evidence is really overwhelming that £30 is not by any means the best rent which could be obtained for this land at the expiration of the original lease of thirty years.

How is it possible, then, to grant specific performance of this covenant? It seems to me quite impossible: it is out of the question.

Then it is said that the lease was granted under the sanction of the Court; that the lease itself was settled by the Judge in Chambers and has the Chief Clerk's certificate in the margin of it; that all the persons who were then interested beneficially in the land were before the Court, either actually or by representation through their trustee, and that accordingly the sanction given by the Court binds them. Well, for the moment I assume that all the beneficiaries were before the Court. What does it bind them to? Does the sanction mean that the covenant should be enforced whether at the time the rent was the best rent or not. That is a perfectly idle contention. The argument contains a fallacy. The lease was a perfectly good lease: the covenant was a perfectly good covenant. Why should not the Court sanction it? Of course the Court must be taken to know the law. All the persons concerned in both granting and accepting this lease knew the facts perfectly well, for the lease on the face of it shews that it is a lease granted under this power. Is the Court to be taken to have warranted that, whatever might have happened in the meantime, this covenant should be enforceable? Nothing of the sort. The Judge either in Chambers or in Court is applied to to sanction an agreement for a lease: the agreement on the face

of it stipulates that the lease shall contain a covenant for renewal. What would the Judge say? He would say, "The covenant for renewal is perfectly good: it is not invalid in itself, and it does not invalidate the lease: it is a perfectly good covenant, I see no reason why I should not sanction it. Of course, we all know that, when the time for renewal comes, another question may possibly arise; but that is no reason why the agreement should not be sanctioned, or why the lease should not be settled containing this covenant in it."

I have not been able to follow the argument on that point at all. It really goes to this extent, namely, that the sanction of the Court means, not only that the lease and the agreement are good, but that every covenant in the lease shall be carried out in the very terms of it when the time for carrying it out comes. Whoever heard of the sanction of the Court having such a meaning? In my opinion, the sanction of the Court meant nothing of the kind; it merely meant, "This is a lease such as may be granted under the power, and we sanction it for that reason."

Now, that makes it unnecessary to consider whether or not all the beneficiaries were before the Court; because, the sanction being only to the granting of a valid and good lease, it does not matter whether they were before the Court or not. If the lease were invalid, then I could understand the argument that this lease, though invalid, having been sanctioned by the Court in the presence and on behalf of the beneficiaries, they are bound by the lease, though invalid; but, as I have pointed out, no such question arises at all. The case is treated on both sides just as if the lease itself were valid. I am unable to accede to any argument arising in favour of the Plaintiffs' claim from the fact that the agreement was sanctioned by the Court, or that the lease was settled by the Court, even if it were the fact, which I will not now consider more closely, that all the beneficiaries were before the Court when that sanction was given. That sanction did not mean that this covenant should be carried out *modo et formâ*, when the time arrived, whether, when the time arrived, the terms of the covenant would be consistent with the law of powers or not. That is the ground on which my judgment rests on that point.

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But a very much more serious question was raised. It is said that when this lease was granted what was really intended was this: on the one side the *London Gas Light Company* were to make a large expenditure in building on this land; and they did, in fact, according to the evidence before me, expend £2000 in erecting the buildings which are now upon this land. It is said that the real contract was to give them a lease of sixty years in consideration of that expenditure, and that the agreement shews on the face of it that it was in contemplation of both parties that that expenditure would immensely increase the value of this land, not merely during the original term of thirty years, but during the renewed term of thirty years.

Now, can it be supposed that the parties intended that that expenditure should be made upon a ground rent of £30, which would presumably—almost certainly—raise the value of the property so much that at the end of the first thirty years that £30 would not anything like represent the best rent then? Can that have been the meaning of the parties? The argument is to this effect: all parties must have been well aware that when the first term of thirty years expired £30 would not be the best rent; and if they knew that at the time when the lease was granted, is it reasonable to suppose that it was their intention to insert a covenant in this lease which they must have known could not be specifically performed? I confess I think the argument is a very cogent one, and deserves the greatest possible consideration, and I have therefore considered it with the utmost attention. The answer seems to me to be this: I cannot assume that the parties were not aware of this point, because it is part of the general law which they all must have known. They did not take a term of sixty years. Why not? They might if they had chosen to do so. One obvious reason is that the lessor had not power to grant a term of sixty years then, because the license of the lord extended only to fifty-one years, but they might have taken a term of fifty years or fifty-one years. Why did they not do so? I do not know why they did not: but with the facts plain before them, they chose to take a lease for thirty years with a covenant to renew for another thirty years; and not only so, but the agreement for the lease was in that form. What power has this Court

to alter the clear bargain carried out most deliberately by a lease which is entirely in conformity with that bargain, because it turns out in the result to be a hardship upon them? The Court has no such power. In the first place, I have no pleading before me raising the point or asking for a rectification of the original lease, which is what the argument amounts to: and if there were such pleading, there is not a tittle of evidence which would justify me in saying that the original lease was not according to the contract of the parties, which is the only possible case for rectification. In every case of rectification you have two things to prove to the Court; first, the real nature of the contract of the parties; and secondly, that the lease or conveyance, or whatever it is which was actually granted, was not according to that contract. But here I have the contract of the parties proved, and the lease is entirely in conformity with it. There is no possibility of suggesting mistake or surprise, or any ground on which I could alter the original lease. That fact, even if rectification were claimed, which, as I have said, it is not, would make it impossible to grant rectification on the footing of the original lease not being the lease which the parties intended. I am satisfied that that lease was exactly what the parties at the time intended; and it certainly would be a very strange thing if it had not been, when they had the advantage of having not merely the agreement they entered into, but also the lease which was framed in conformity with it, approved and settled by a Judge of the Court of Chancery.

But then it is said that the Court may alter this lease under the powers conferred by 12 & 13 Vict. c. 26. That statute only enables the Court to remedy defects in leases; and before the statute applies it must be shewn that there is a defect in the lease. The preamble of the statute commences thus: "Whereas through mistake or inadvertence on the part of persons granting leases, and through ignorance on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the successors in estate of such persons by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers."

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Now, has there been here any "mistake," or "inadvertence," or "ignorance on the part of the lessees" of the title? Nothing of the kind. I fail to find the least trace of any one of these three things. Therefore having regard to the preamble, the Act obviously does not apply, even if the lease were defective. But sect. 2 enacts "that where in the intended exercise of any such power of leasing as aforesaid, whether derived under an Act of Parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid, ... such lease, in case the same have been made *bonâ fide*, and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, his heirs, executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract." The Act was amended by the Act 13 & 14 Vict. c. 17, but again that Act does not touch the point which I now have to consider. How then does the former Act apply? I am unable to say. As I have said, the lease is a perfectly good lease; the covenant in it is a perfectly good covenant. There is no "mistake," no "inadvertence," no "ignorance of title," nothing whatever which would enable me to apply the terms of that Act to this lease. I cannot find any defect; I find that the parties deliberately, voluntarily, knowing exactly what the powers were, chose to take their lease in this form. I am quite unable to see any defect, any mistake, any inadvertence, or anything whatever to induce me to alter the form of the lease in any respect. So much for that objection. Accordingly, it seems to me that this action, so far as it seeks specific performance, fails entirely.

But then it is said, if it fails as to specific performance, at any

rate there is a remedy in damages; and leave is asked to amend the statement of claim so far as is necessary to raise that point properly.

Now the remedy in damages, of course, must be against the original covenantor, or his estate. The present trustees can hardly be made liable in damages; they have no estate out of which those damages could be recovered, unless it is taken out of the estate of which they are mere dry trustees. But I am asked to allow an amendment by stating in the statement of claim that two of the Defendants are the legal personal representatives of *Lett* the original trustee, and by treating this as an action against his estate for damages for breach of covenant. Well, probably it might be right to allow such an amendment rather than to put the parties to bring another action.

I do not at all overlook the remarkable decision in *Hipgrave* v. *Case* (1). It seems to me, according to that authority, looking also to the fact that there is no statement here whatever that the legal personal representatives of the original trustee are before the Court in that character, that the pleading as it stands would probably not be sufficient to entitle the Plaintiffs to damages against the estate of the original lessor, the trustee *Lett*. But supposing the amendment be allowed, is this a case in which damages could be recovered? The case, according to the view which I have taken of it, would be shortly this: the *London Gas Light Company*—knowing that *Lett* had only a power to demise under the special Act, the *Randall Estate Act*, and knowing, therefore, or having clear notice of the limit of his authority—take a lease from him for thirty years with a covenant to renew at the end of that thirty years, a covenant which is, as I have said, perfectly good, the lease being a valid demise. That covenant could be enforced if it happened at the end of the thirty years that the rent reserved was the best rent, and the other conditions of the power were properly complied with. But the parties who took the lease, as well as the party who granted it, were well aware of all the facts: the lessees knew the title of the lessor; they knew that he was acting under a power. I must take them to have known the law. It is

(1) 28 Ch. D. 356.

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impossible for them, or for their successors or assigns, to say that they did not know what the law was: therefore they must be taken to have known, when they accepted this covenant, that there was a possible infirmity in it when it came to be enforced. Can they have damages? If a man says this—to put the case in the simplest possible form—"I agree with you, who I know are a person having a mere power of leasing, to take from you a lease at a future time at a certain rent;" and if, when that future time comes, it turns out that the property has increased in value and the agreement cannot be fulfilled, can he have damages for that? It seems to me that a man who, with his eyes open, enters into a contract with a person who has a leasing power to take a lease at a future time at a certain rent must be taken to know that such contract is subject, from the very first moment it is entered into, to this possible infirmity, that when the time comes the rent to be reserved may not be the best rent, and that the contract cannot be carried out; but would that involve the trustee who enters into that contract in a liability for personal damages? I have listened in vain for authority in favour of that proposition; but there is authority against it, namely, the case of *Bain* v. *Fothergill* (1). In that case certain purchasers attempted to recover damages for the breach of a contract to sell certain real estate, which contract could not be carried out by reason of the infirmity of the vendors' title. Lord *Hatherley*, in his speech in the House of Lords, used these words (2): "The foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognised on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title." Again, he says,

(1) Law Rep. 7 H. L. 158. (2) Law Rep. 7 H. L. 210.

"A contract for a sale of real estate is very different indeed from a contract for a sale of a chattel, where the vendor must know what his right to the chattel is."

Lord *Chelmsford's* language is to the same effect. He says (1): "If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." In an action for deceit, as is well known, you have to prove actual fraud.

Therefore, it seems to me, that the authorities are clearly against this claim for damages. If a man enters knowingly into a contract concerning real estate—and for this purpose a contract for a lease is, in my opinion, a contract for real estate—if he enters into it knowing exactly what the title of his vendor is, and that the carrying out of the contract eventually is subject to a possible difficulty, how can he turn round and say, "Although I entered into that contract with you, knowing of that difficulty, still I hold you liable for damages"? I must read into this contract the general law at the time when this contract was made, which was this, that if, when the time arrived for the contract to be performed, the rent of £30 a year was not the best rent, the trustee would have no power whatever to renew it.

Holding, as I do, that both parties must be taken to have known that this was an infirmity incidental to the nature of the real estate which they were contracting about, and to the title of the lessor and covenantor to deal with that real estate, it seems to me that I am only acting in conformity with that which I understand to be the doctrine as laid down in *Flureau* v. *Thornhill* (2), *Bain* v. *Fothergill* (3), and other cases, in saying that, where the trustee says, "I am perfectly willing, if I have power, to carry out this contract, and I only fail to do so because of the nature of the subject-matter, it being real estate, and of the infirmity of my title and of my power to carry out the contract," that is a case in which the trustee is not liable for any damages.

(1) Law Rep. 7 H. L. 207. (2) 2 W. Bl. 1078.
(3) Law Rep. 7 H. L. 158.

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Now that determines this case upon the first point argued, and I do not intend to go further, or to examine the other objections which have been raised. I confess I think some of them are formidable: I will not say more about them than that. They are points upon which, my opinion being very clear upon the first point, it is not necessary for me to give any decision. I must therefore dismiss this action; but I have great hesitation about dismissing it with costs. If that is asked for, I must hear an argument upon it.

Hemming:—I do not ask for costs.

KAY, J.:—Then the action will be dismissed without costs.

Solicitors: *Brown & Hill*; *Webb & Burt.*

G. I. F. C.

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1887
May 7.

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[1885 C. 536.]

Mortgage—Sale under Power—Surplus Proceeds—Interest on—Amount understated by Mortgagee—Costs.

Where a mortgagee sells under his power of sale and, after he has paid himself his debts and costs out of the purchase-money, a surplus remains in his hands, it is his duty, if he cannot ascertain who are the persons entitled to the surplus, to set it apart so as to be fruitful for their benefit, and if he fails to do so he will be charged with interest at 4 per cent. from the time of the completion of the sale.

A mortgagee in possession sold under his power of sale and retained surplus proceeds of sale. In an action against him for accounts he admitted that a sum was due from him, and paid such sum into Court. On the taking of the accounts it appeared that a considerably larger sum was due:—

Held, that he ought not to be allowed his costs of taking the accounts.

JAMES EYTON, who died on the 26th of December, 1859, by his will dated the 29th of October, 1859, gave all his real and personal estate to trustees (who were also his executors) upon trust for his wife during her life, and after her death upon certain trusts in favour of his children.

The testator's widow died on the 30th of January, 1870.

By an indenture dated the 21st of April, 1868, the trustees of

the will, with the sanction of the High Court of Chancery, mortgaged a portion of the testator's real estate to secure £400 with interest at £5 per cent. per annum. The mortgage contained the usual power of sale, with a direction that the surplus proceeds of sale should be paid to the mortgagors "or the survivor of them or the executors or administrators of such survivor, their or his assigns, or other the trustees or trustee for the time being of the aforesaid will of the said *James Eyton*, or to his personal representative or representatives for the time being."

By virtue of indentures dated the 17th of March, 1870, and the 8th of October, 1874, the mortgage was transferred to the Defendant *Richard Jones*.

The last surviving trustee of the will, who was an undischarged bankrupt at the date of his death, died on the 15th of February, 1880, intestate, and no representation was taken out to his estate. Since his death there had been no trustee of the will of *James Eyton*, or representative of his estate.

In the year 1880 the Defendant *Jones* entered into possession of the mortgaged property, and received the rents and profits thereof.

In October, 1884, in exercise of the power of sale contained in the mortgage, he sold the property for £1760. The sale was completed, and the whole of the purchase-money paid, on the 11th of December, 1884.

On the 9th of February, 1885, this action was brought by *Anne P. Charles*, one of the children of the testator, against the Defendant *Jones*, and *Charlotte P. Baines* and *W. M. Forty* (persons beneficially entitled under the will), claiming an account against the Defendant *Jones* of all moneys, whether for rents, profits, purchase-money, or otherwise, received by him as mortgagee or in relation to the mortgage, payment of what should be found due, and distribution thereof amongst the Plaintiff and the other persons interested, and, if necessary, the appointment of new trustees of the will.

The Defendant *Jones* put in a defence stating that after deducting the amount due to him under the mortgage, the costs of sale, and auctioneer's charges and other expenses, he had in his hands a sum of £600 or thereabouts, and pursuant to an order dated

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the 1st of May, 1885, he paid the sum of £600 into Court to the credit of the action.

By the judgment given in the action on the 25th of November, 1885, the following accounts and inquiry were directed: (1.) An account of what was at the date of the completion of the sale due to the Defendant *Jones* for principal and interest under the mortgage, and what was due to him for his costs of the action; (2.) An inquiry whether anything and what was due to him for costs, charges, and expenses properly incurred in respect of his security not being costs of the action; (3.) An account of rents and profits of the mortgaged hereditaments received by him; and (4.) An account of all moneys whether for purchase-money or interest received by him, or which without wilful default or neglect might have been received by him, on the sale of the said hereditaments; and it was ordered that what should appear to be due on the account No. 4 should be added to what should appear to be due on the account No. 3, but in making such addition credit was to be given for the £600, and it was ordered that what should appear to be due to the Defendant *Jones* under the account and inquiry Nos. 1 and 2 respectively, should be deducted from the total amount due from him. Certain inquiries were directed for the purpose of ascertaining the persons beneficially interested under the will.

The Chief Clerk by his certificate, dated the 13th of January, 1887, found that £592 16*s.* 6*d.* was due to the Defendant *Jones* for principal and interest; £67 14*s.* 7*d.* for his costs of the action; and £181 1*s.* for his other costs, charges, and expenses; that £272 16*s.* was due from him in respect of rents and profits, and that the moneys, whether for purchase-money or interest, received on the sale amounted to £1760. He accordingly found that, after giving credit for the £600, there remained due from the Defendant *Jones* the sum of £591 3*s.* 11*d.*

On the action now coming on to be heard on further consideration, the questions arose, first, from what period interest was to be calculated on the balance of purchase-money which remained in the hands of the Defendant *Jones* after payment of his mortgage debt and costs; and, secondly, whether he ought to be allowed his costs subsequent to the judgment.

Ince, Q.C., and *Rawson*, for the Plaintiff:—

The Defendant *Jones* ought to be charged with interest at 4 per cent., from the date of the completion of the sale, on the balance which remained in his hands after he had paid himself his debt and costs. He must therefore pay 4 per cent. on the £600 until it was paid into Court, and on the £591 3*s.* 11*d.* until actual payment. It is clear that a mortgagee who has sold under his power of sale is a trustee of any surplus proceeds of sale for the persons entitled to the equity of redemption. In *Matthison* v. *Clarke* (1) a mortgagee with power of sale was a member of a firm of auctioneers; the firm sold for him, and it was held that they were not entitled to their commission, and Vice-Chancellor *Kindersley* stated the reason thus: "It appears to me, that the defendant, having a power of sale, and having executed it, is, in respect of the surplus, a trustee, or in the nature of a trustee." It is true that in the same case (2), it was held that the mortgagee was not liable to pay interest on the balance of the purchase-money, but that was on the ground that he had expressed his readiness to pay to the parties who claimed to be entitled if only they would settle the matter amongst themselves.

[KAY, J., referred to *Warner* v. *Jacob* (3) and *Sands to Thompson* (4).]

Renshaw, Q.C., and *Ford*, for the Defendant *Forty*, and *De Courcy Atkins*, for the Defendant *Baines*, adopted the same arguments.

Marten, Q.C., and *Arkcoll*, for the Defendant *Jones*:—

Interest is payable only from the date of the Chief Clerk's certificate. By the mortgage deed no trust was declared of the purchase-money. There was simply a direction to pay, and, as was said in *Banner* v. *Berridge* (5), no trust affecting the mortgagee can possibly arise until it is shewn that there is a surplus in his hands; then only does he become a trustee. It was not ascertained that anything was due from this mortgagee until the balance was found by the certificate. There was no refusal by

(1) 3 Drew. 3.
(2) 25 L. J. (Ch.) 29, *sub nom.* *Mathison* v. *Clark*.
(3) 20 Ch. D. 220.
(4) 22 Ch. D. 614.
(5) 18 Ch. D. 254, 269.

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him to account, and any question of that kind is concluded by the terms of the judgment which gave him his costs of the action.

[KAY, J., referred to *Tanner* v. *Heard* (1).]

That case was commented on in *Banner* v. *Berridge* (2), where your Lordship pointed out that it was not an authority for saying that a mortgagee selling under his power of sale is a trustee of the proceeds.

[KAY, J., referred to *Knox* v. *Gye* (3) and in particular to the observations of Lord *Westbury* (4).]

Until it was ascertained that there was a surplus, *Jones* was a mere debtor bound to pay, according to the terms of the mortgage deed, to the trustees or trustee of the will, and there was no trustee in existence to whom he could pay. The appointment of new trustees is part of the relief claimed in the action.

At all events, interest can only run from the time of the commencement of the action. In *Quarrell* v. *Beckford* (5) a mortgagee in possession held over after payment of his principal and interest, and it was held that interest on the balance due from him must be calculated from the filing of the bill, "for at that period the demand was made and ought to have been complied with."

The Defendant *Jones* ought to be allowed to deduct from the balance payable by him his costs of taking the accounts. In *Quarrell* v. *Beckford* the mortgagee was allowed his costs subsequent to the decree. *Cotterell* v. *Stratton* (6) is an authority that a mortgagee will not be deprived of his costs in a redemption suit because he has overstated the amount due to him, and to the same effect is *Turner* v. *Hancock* (7). This action is in the nature of an action for redemption.

KAY, J.:—

It seems to me that the Defendant *Jones*, the mortgagee, is liable to pay interest upon the amount found due from him, and

(1) 23 Beav. 555.
(2) 18 Ch. D. 262.
(3) Law Rep. 5 H. L. 656.
(4) Law Rep. 5 H. L. 675.
(5) 1 Madd. 269.
(6) Law Rep. 8 Ch. 295.
(7) 20 Ch. D. 303.

also that I cannot give him any costs of these accounts. This action was brought against him by the Plaintiff, alleging that he had sold the mortgaged property, and that, after payment of the mortgage debt, a large surplus remained in his hands, and claiming an account of the moneys due from him. He put in a defence stating that after deduction of the amount due to him as mortgagee, and the costs of the sale, there remained in his hands £600 or thereabouts, which sum he then proceeded to pay into Court. The action came on for trial, and all his costs up to trial were given to him as a mortgagee defending his position; accounts were directed in order to ascertain the amount due from him, and it was found that, in addition to the £600 which he admitted to be due, there was still due from him the sum of £591 3*s.* 11*d.* Now I am asked to give him his costs of those accounts. That is to say, when he has stated positively that nothing more than £600 or thereabouts is due from him, accounts are directed in consequence of his denial that anything more is due, and the result of these accounts is that a balance is found against him, he is to be allowed his costs of these accounts. If that be the rule as to a mortgagee's costs in such a case, it should be altered, but I am not aware that there is any such rule, and accordingly I give him no costs.

Then the question remains as to his liability to pay interest upon the balance of purchase-money in his hands. I have never heard it doubted that where a mortgagee sells, and has a balance in his hands, he is a trustee of that balance for the persons beneficially interested. He takes his mortgage as a security for his debt, but, so soon as he has paid himself what is due, he has no right to be in possession of the estate, or of the balance of the purchase-money. He then holds them, to say the least, for the benefit of somebody else, of a second mortgagee, if there be one, or, if not, of the mortgagor. What, then, is he to do? Surely he has a duty cast upon him. His duty is to say, "I have paid my debt: this property which is pledged to me, and in respect of which I now hold this surplus in my hands, is not my property. I desire to get rid of this surplus, and hand it back to the person to whom it belongs." It is said there was a difficulty in the way of his doing that, because there was no trustee of the will,

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and consequently no one to whom the money could be paid. But it has long since been held that a mere stakeholder may avail himself of the *Trustee Relief Act* and pay the money which is in his hands into Court. The duty of this mortgagee was at least to set this money apart in such a way as to be fruitful for the benefit of the persons beneficially entitled to it. To that extent and in that manner he was, according to my understanding of the law, in a fiduciary relation to the persons entitled to the money. It was so held in the case of *Quarrell* v. *Beckford* (1), and so far as I know has always been so held, and although I quite agree that the Court is very reluctant to treat a mortgagee as being a trustee in any sense while any money is due to him, still when he has paid himself, and has money remaining in his hands which is no longer his property, how can he be treated as other than a trustee of such money? I hold, therefore, that the Defendant *Jones* is liable to pay interest at 4 per cent. upon the money remaining in his hands after he had paid himself his debt and costs. That amount is now known, and he must be charged with interest upon it from the date of the completion of the sale, and, as I have said, I cannot give him any costs of the accounts.

Solicitors: *W. P. Barton Browne; Richard Jones & Co.; Mead & Daubeny* for *Smith & Sons, Weston-super-Mare; Edwin Andrew.*

(1) 1 Madd. 269.

C. C. M. D.

In re HALL.
BRANSTON *v.* WEIGHTMAN.

[1887 H. 1183.]

KAY, J.
1887
May 23.

Will—Construction—Illegitimate Child described as "Nephew" of Testator.

A testator described *R. W.* and another person (who was a legitimate nephew of the testator) as "my two nephews." He gave his residuary estate upon trust for the "children" of his brothers *E. H.* and *T. H.*, and of his sister *J. W.* and his late sister *S. B.*, in equal shares, with a gift over if any one or more of his "nephews and nieces" should die before him leaving children. *R. W.* was an illegitimate child of *J. W.*, who had four legitimate children, three sons and one daughter:—

Held, that the circumstance that *R. W.* was described by the testator as "nephew" was not sufficient to entitle him to share under the gift to the children of *J. W.*

HENRY HALL, who died on the 12th of February, 1866, made his will, dated the 6th of February, 1861, commencing as follows:—"I appoint my two nephews, *Richard Weightman*, of *Averham*, in the county of *Nottingham*, farmer, and *Henry Branston*, of, &c., and *Henry Newbold*, of, &c., executors of this my will." After giving certain pecuniary legacies, including a charitable legacy of £160 to "the said *Richard Weightman*, *Henry Branston*, and *Henry Newbold* (who are hereinafter called my trustees)" and "the legacy of £10 to each of my trustees," and after devising and bequeathing certain specified property, the testator gave his residuary estate to his trustees upon trust, after the decease of his wife, and in default of his having issue, as follows:—"Upon trust for and I give the same to all the children of my brothers *Edward Hall* and *Thomas Hall*, and of my sister *Jane Weightman* and of my late sister *Sarah Branston*, in equal shares and proportions as tenants in common, the children of my late nephew, *Joseph William Branston*, taking amongst them in equal parts the share to which he would under this bequest have been entitled as one of my sister *Sarah's* children if he had survived me, but if any one or more of my nephews and nieces shall die before me leaving a child or children, I give

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his or her share to such child or children, if more than one, equally."

Richard Weightman, and the Plaintiffs *Henry Branston* and *Henry Newbold*, the executors named in the will, duly proved the same.

The testator never had any issue.

Richard Weightman, afterwards known as *Richard Hall Weightman*, was born on the 25th of September, 1803. He was reputed to be a son of *Jane Weightman*, then *Jane Hall*, spinster, by *William Weightman*, to whom she was afterwards married, viz. on the 24th of October, 1803. *Jane Weightman* had four other children, three sons and one daughter, who were born subsequently to her marriage, the youngest being born on the 10th of August, 1816. There was no legitimate child of the marriage named *Richard*.

The Plaintiffs *Henry Branston* and *Joseph William Branston* in the will named were respectively of legitimate birth, and were nephews of the testator.

Richard Hall Weightman died on the 22nd of November, 1882, having made a will, of which the Defendants *T. Weightman*, *J. H. Weightman*, and *R. M. Weightman* were the executors.

The testator's widow died on the 6th of June, 1886.

A summons was taken out by the Plaintiffs under the Rules of the Supreme Court, 1883, Order LV., rule 3, for the determination of the following question (amongst others), viz., whether *Richard Hall Weightman*, in the will named *Richard Weightman*, was in his lifetime and his estate now was entitled to any and what share in the residuary estate of the testator under the bequest in the said will to (amongst others) the children of the said *Jane Weightman*.

J. G. Branston, one of the beneficiaries under the will, was made a Defendant as sufficiently representing himself and the others of the beneficiaries whose interest it was to contend that *Richard H. Weightman* was not entitled to share.

One of the brothers of *Richard H. Weightman* made an affidavit (sworn on the 22nd of April, 1887), stating that he was never informed by his parents that *Richard H. Weightman* was illegitimate, and always believed him to be legitimate until

about fifteen years ago; that at the time of the birth of *Richard H. Weightman* the testator was seventeen years old, and, as the deponent believed, was away from home serving his apprenticeship, and that he was confident that the testator did not know of the illegitimacy of *Richard H. Weightman*.

Begg, for the Plaintiffs, submitted the question to the Court.

Freeman, for the Defendants, the executors of *Richard H. Weightman*:—

R. H. Weightman, whom the testator has described as his "nephew," is entitled to share under the residuary gift to the "children" of the testator's sister *Jane Weightman*.

[KAY, J., referred to *In re Haseldine* (1).]

The description "my nephew" is equivalent to "child of my sister," and is a clear indication that the testator intended to include *R. H. Weightman* among the children of *Jane Weightman*.

[He referred to *Hill* v. *Crook* (2); *In re Humphries* (3), and *In re Bryon* (4).]

[He was then stopped.]

Borthwick, for the Defendant *J. G. Branston*:—

Only the legitimate children of *Jane Weightman* can take under this gift. An illegitimate child cannot take under a gift to "children" unless there is a clear expression of intention by the testator which compels the Court to come to the conclusion that he meant to include in the term "children" a person whom he knew to be illegitimate: *Hill* v. *Crook*; *Dorin* v. *Dorin* (5). Here there is no such expression of intention. The illegitimate child is merely described as nephew, and in a sense he was a nephew of the testator.

[KAY, J.:—He could not be a nephew unless he was the legitimate son of the testator's sister.]

In *Megson* v. *Hindle* (6) an illegitimate grandson of the testator

(1) 31 Ch. D. 511.
(2) Law Rep. 6 H. L. 265.
(3) 24 Ch. D. 691.
(4) 30 Ch. D. 110.
(5) Law Rep. 7 H. L. 568.
(6) 15 Ch. D. 198.

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was described by him as "my grandson *J.*, the son of my daughter *Alice Jane*," and yet it was held that he could not take under a subsequent gift to the children of *Alice Jane*. To the same effect is *Bagley* v. *Mollard* (1), where an illegitimate grandchild of the testator was described as "my grandchild, the now only surviving child of my son *William*."

[KAY, J., referred to *Owen* v. *Bryant* (2), and *In re Humphries* (3).]

The case last mentioned is distinguishable, because there the plural word "daughters" was used, which could only be satisfied by holding that the illegitimate child took a share. In *Smith* v. *Lidiard* (4) the testator gave a legacy to a "niece" and bequeathed residue in trust for his "nephews and nieces;" the legatee was a niece by marriage only, and it was held that she could not take under the gift of residue.

The motive of the gift to children was not to benefit individuals but a class of persons, members of the testator's family, and the mere fact that he has described by the term "nephew" a person who was not a member of the family cannot entitle such person to a share.

The evidence tends to shew that the testator did not know that *R. H. Weightman* was illegitimate. There is no case in which an illegitimate child has been allowed to take where it was not shewn that the testator knew that he was illegitimate.

Morshead, for another Defendant.

Freeman, in reply:—

[KAY, J.:—How do you distinguish *Megson* v. *Hindle* (5)?]

There there was a gift of £500 to the illegitimate child by name, and if he did not attain a particular age that sum was to go in augmentation of a larger legacy which was given to the "children" of his mother, and it was very improbable that the testator intended that he should take a share under the second gift. In *Bagley* v. *Mollard* there was also a substantial gift to the illegiti-

(1) 1 Russ. & My. 581.
(2) 2 D. M. & G. 697.
(3) 24 Ch. D. 691.
(4) 3 K. & J. 252.
(5) 15 Ch. D. 198.

mate child, a circumstance which was regarded as material by the Court in *In re Humphries* (1). In *Hill* v. *Crook* (2) it was said that if you find a nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law requires. The nomenclature used by this testator shews plainly that the word "children" must be read in an enlarged sense. In *Dorin* v. *Dorin* (3) there was no context in the will to aid the construction of the word "children" in favour of illegitimate children.

The question of motive cannot be considered, except so far as the motive is expressed on the will. Nor is it material whether the testator did or did not know that the person whom he treated as legitimate was illegitimate: it is sufficient that he has shewn on the face of the will an intention to include him among the "children."

KAY, J. (after stating the will and the facts of the case, continued):—

The question is whether under the gift to the children of the testator's sister *Jane Weightman*, *Richard H. Weightman*, who is called "nephew" in the early part of the will, is to be included. Of course I cannot help feeling some inclination in his favour; but it is important not to depart from the rules which have been laid down on this matter, and I find that the authorities stand thus:—In *Bagley* v. *Mollard* (4), a testator gave a leasehold in trust for his "grandchild *Elizabeth* the now only surviving child of my son *William*," and gave the residue of his property after the death of his wife and daughter to all the children of his sons, *James* and *William*, and of his daughter *Sarah* in equal shares. *Elizabeth* was illegitimate and *William* had no other child; it was held by the Master of the Rolls (Sir *John Leach*), that *Elizabeth* was not entitled to any share of residue. His Lordship, following the opinion of Lord *Eldon* in *Wilkinson* v. *Adam* (5), put the case upon the broad ground that "whenever the general description of children will include legitimate

(1) 24 Ch. D. 696.
(2) Law Rep. 6 H. L. 285.
(3) Law Rep. 7 H. L. 568.
(4) 1 Russ. & My. 581, 586.
(5) 1 V. & B. 422, 468.

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children, it cannot also be extended to illegitimate children." Now that case was considered by the late Master of the Rolls, Sir *George Jessel*, and by the Court of Appeal in *Megson* v. *Hindle* (1). There there was a gift as follows: "I bequeath unto my grandson *James* (the son of my daughter *Alice Jane*, and who is now residing with me) the legacy or sum of £500, to be paid to him if and when he shall attain the age of twenty-one years, but with power for my executors to apply the interest arising therefrom in the meantime for or towards his maintenance and education. But in case my said grandson *James* shall die under the age of twenty-one years, then I direct that the said sum of £500 and the unapplied interest thereof shall go in augmentation of the legacy of £2000 hereinafter bequeathed upon trusts in favour of the children and issue of my said daughter *Alice Jane*." The testator gave to trustees £2000 to be accumulated until the expiration of twenty-one years, or the death of *Alice Jane*, whichever should first happen, and then directed that the fund and its accumulations should be divided amongst all the children of *Alice Jane* living at the period of distribution, and the issue then living of any of her children who should be then dead. The testator gave two sums of £2500 upon trusts for the children and issue of his two other daughters respectively, corresponding with the trusts of the £2000. *James*, though called "grandson," was illegitimate. He attained twenty-one, and survived his mother, and it was held on the authority of *Bagley* v. *Mollard* (2) by the late Master of the Rolls that he could not take a share of the £2000; and that decision was affirmed on appeal, the ground, to take it from the judgment of Lord Justice *Cotton*, being this (3):—"To take a case out of the common rule that only legitimate children can take under a gift to 'children,' there must be on the face of the will such a strong probability of the testator's intending to include illegitimate children, that a contrary intention cannot be imputed to him." These cases were lately before Mr. Justice *North*, in the case of *In re Humphries* (4), in which he delivered a considered judgment. After commenting on the cases and referring to the fact that the illegitimate child was there described by the testator as the

(1) 15 Ch. D. 198.
(2) 1 Russ. & My. 581.
(3) 15 Ch. D. 205.
(4) 24 Ch. D. 691.

eldest daughter of his deceased daughter, his Lordship said this (1): "I think both *Bagley* v. *Mollard* (2) and *Megson* v. *Hindle* (3) are sufficient to shew that I could not for that reason alone hold that she was intended to be included under the description of 'children' of the daughter *Sarah Ann Smith*." But there were the additional words, "the shares of such of them" (*i.e.* the children) "as shall be daughters to be for their sole and separate use." There was only one other daughter of *Sarah Ann Smith*, the deceased daughter of the testator, and therefore if the illegitimate daughter had been excluded, the plural word "daughters" would not have been satisfied. For that reason Mr. Justice *North* thought that a distinction could be made in that case.

Here there is nothing whatever in the will to include *Richard H. Weightman* among the children of *Jane Weightman* except the description of him in the earlier part of the will by the word "nephew." I am bound to say on the authority of these cases that that does not seem to me by itself to be sufficient. The testator gives to him a small legacy, a circumstance which is rather inconsistent with his having another legacy. The inconsistency is not so great as it was in *Megson* v. *Hindle*, because the legacy is only given to him as trustee for his trouble, but still there is to some extent an inconsistency, and on the whole I am afraid that the general rule is against the claimant, *Richard H. Weightman*, and I must hold that he does not take as one of the children of *Jane Weightman* under the general gift to children contained in the later part of the will.

Solicitors: *J. E. Fox & Co.*; *P. Hodgkinson*, for *Pratt & Hodgkinsons, Newark.*

(1) 24 Ch. D. 696. (2) 1 Russ. & My. 581.
(3) 15 Ch. D. 198.

C. C. M. D.

KAY, J.
1887
May 24.

In re SMITH.
LORD *v.* HAYWARD.

[1883 S. 4621.]

Will—Gift to "Children," held to mean "Grandchildren."

A testator gave his residuary real and personal estate to trustees in trust for sale, and to divide the proceeds into six shares, and to pay one of such shares to the "children" of his deceased sister; and he gave the other five-sixths in similar terms to the "children" of five deceased persons. At the date of the will there were no children of the sister living, but there were two grandchildren, and these facts were well known to the testator. Both the grandchildren survived the testator:—

Held, that the two grandchildren took the one-sixth given to the "children" of the deceased sister.

Radcliffe v. *Buckley* (1) distinguished.

HENRY SMITH, of *Northiam, Sussex*, by his will dated the 29th of December, 1884, gave his residuary real and personal estate to his executors and trustees upon trust for sale and to divide the proceeds into six equal shares, and to pay one of such equal sixth shares unto and equally between "all the children" of his late brother *James Smith*, "who shall be living at my death," and to pay one other of such sixth shares unto and equally between "all the children" of his late brother *William Smith*, "who shall be living at my death; and to pay one other of such sixth shares unto and equally between all the children of my late sister, *Barbara Humphrey*, who shall be living at my death." And the other three-sixths he gave, in the same terms, to the "children" of three other deceased persons therein named.

The testator died on the 18th of January, 1886.

At the date of the will there were no children living of *Barbara Humphrey*, but there were two grandchildren, both of whom survived the testator. They were the children of her only child, *Stephen Humphrey*, who died in 1874.

The question was whether these two grandchildren of *Barbara Humphrey* took the one-sixth share given in terms to her "children" only.

An originating summons was taken out by the trustees and executors to obtain the opinion of the Court upon this question,

(1) 10 Ves. 195.

the Defendants being the two grandchildren, and also one of the next of kin whom his Lordship directed to represent, for the purpose of the summons, the whole class of next of kin.

From the evidence it appeared that the testator's nephew, *Stephen Humphrey*, and the children of the latter, had all lived at *Northiam;* that the testator was present at his nephew's funeral, and that when he made his will he was well aware of the fact that his nephew's two children were then living, and that there were no surviving children of *Barbara Humphrey*.

Tremlett, for the Plaintiffs.

Byrne, for the grandchildren:—

The rule is that, under a gift to "children," where there are no children living at the date of the will, but there are grandchildren, the grandchildren may take: *Berry* v. *Berry* (1); *Crooke* v. *Brookeing* (2); *Fenn* v. *Death* (3); *Hawkins* on Wills (4).

Dauney, for the next of kin:—

The word "children" cannot have two different meanings in the same will. Thus where there was a gift to the "children" of several deceased persons, and one of those persons had, at the date of the will, grandchildren and no child, while, as in the present case, there were children living of the other persons, the Court refused to give different meanings to the word "children" in the different cases, and accordingly the gift was held to be confined to children exclusively: *Radcliffe* v. *Buckley* (5); *Loring* v. *Thomas* (6); *Jarman* on Wills (7).

KAY, J.:—

The law seems to stand thus. If the testator on the face of his will gives a legacy to the children of a deceased person, mentioning that person as being dead, and at the date of the will there are no children of that person, but there are grandchildren, then the Court, on the principle *ut res magis valeat*, holds that the gift takes effect in favour of the grandchildren.

(1) 3 Giff. 134.
(2) 2 Vern. 106.
(3) 23 Beav. 73.
(4) Page 85.
(5) 10 Ves. 195, 202.
(6) 1 Dr. & Sm. 497.
(7) 4th Ed. vol. ii. p. 147.

KAY, J.
1887
In re SMITH. LORD v. HAYWARD.

On the other hand, if the testator mentions the children of the late *A. B.*, the late *C. D.*, and the late *E. F.*, and some of these have left children, and one has left grandchildren only, then the Court considers there is a difficulty in holding that the word "children," only once used, can have a different meaning where there are in one case children, and in another case grandchildren.

Again, if on the face of the will the testator shews an intention to use the word "children" in its normal and ordinary meaning, by himself having mentioned "grandchildren," as well as "children," there, again, the Court feels itself obliged to read the word "children" in its ordinary sense.

Now, the present case lies a little between the two. Here the testator has mentioned the children of several deceased persons; but instead of giving his residue in the mass to the children of the late *A.*, *B.*, and *C.*, he divides it into six shares, and gives one sixth to the children of the late *A.*, another sixth to the children of the late *B.*, and so on, describing in each case the class who are to take. Well, that does not give rise precisely to the difficulty which occurred in the case of *Radcliffe* v. *Buckley* (1), which has been referred to, where the Court was asked to give to one use of the word "children" two different meanings. It is quite possible, in the present case that the testator might have meant, in one case, children, and that, in another case where he knew perfectly well that there were no children, he might have used the word "children" to signify a class in the sense of offspring. I therefore think I am at liberty to take the more liberal view of the word the testator has used, and I do so the more readily, because, unless that view be taken, not only will the grandchildren, that is to say, the offspring, take nothing, but there will be an intestacy as to this share. I therefore hold that the grandchildren take, and I make a declaration that the grandchildren of *Barbara Humphrey* are entitled to the one-sixth share directed to be paid to her children.

Solicitors: *Prior, Church, & Adams*, agents for *Philcox, Burwash; Byrne & Lucas*, agents for *M. S. Stephens & Son, Chatham; Kingsford, Dorman, & Co.*, agents for *W. Dawes, Rye.*

(1) 10 Ves. 195.

G. I. F. C.

In re WHISTLER.

KAY, J.

1887

June 9.

Vendor and Purchaser—Title—Executor—Sale by, many Years after Death of Testator.

The rule intimated in *In re Tanqueray-Willaume and Landau* (1), that where an executor is selling real estate, after twenty years have elapsed from the testator's decease, a presumption arises that the debts have been paid, and the purchaser is therefore put upon inquiry, does not in general apply to the case of an executor selling leaseholds of his testator.

A testator bequeathed leaseholds to his executrix upon trust to pay an annuity, and bequeathed his residuary estate to the executrix. Shortly before twenty years had elapsed from the testator's decease the executrix contracted to sell the leaseholds at a price to be ascertained by a named person. Shortly after the twenty years had elapsed the price was ascertained. It was not shewn that there were debts of the testator remaining unsatisfied, nor did it appear that the executrix had been in possession of the leaseholds as legatee:—

Held, that the purchaser was not entitled to require the concurrence of the annuitant in the assignment of the leaseholds.

ADJOURNED SUMMONS.

Samuel H. Davis, by his will, dated the 24th of March, 1864, bequeathed all his leasehold messuages and hereditaments to his daughter *Maria Davis* for the residue of his term and interest therein, upon trust to receive the rents, issues, and profits thereof, and after paying the ground rents, insurance, and other outgoings payable in respect thereof, to pay to his stepdaughter, *Sarah Lincoln*, an annuity of £40 a year during her life. After bequeathing certain legacies the testator gave the residue of his estate, subject to and after payment of his debts, funeral and testamentary expenses, and the annuity and legacies thereinbefore mentioned, to *Maria Davis*, and appointed her sole executrix of his will.

The testator died on the 28th of March, 1867, and his will was proved by *Maria Davis* on the 16th of May, 1867.

The testator was at the time of his death entitled to one moiety of twenty-three leasehold houses.

On the 29th of February, 1872, *Maria Davis* married *Samuel Whistler*.

(1) 20 Ch. D. 465.

KAY, J.
1887
In re WHISTLER.

By a contract in writing, dated the 16th of March, 1887, *Samuel Whistler* and *Maria* his wife, and *M. Ullmer*, and *Rosina* his wife (who were the persons entitled to the other moiety of the twenty-three leasehold houses), agreed to sell the twenty-three houses to *H. Richardson* at a price which was to be ascertained by the valuation of a person named in the contract.

On or before the 26th of March, 1887, the purchaser, *H. Richardson*, delivered to the vendors requisitions on title, by one of which he required that the annuitant, *Sarah Lincoln*, should join in the assignment to release her annuity. The vendors answered that it was believed that *Sarah Lincoln* was dead, but that this did not affect the title of the executrix to sell. The purchaser replied as follows: "It must be ascertained whether *Sarah Lincoln* is alive or dead. It is assumed that Mrs. *Whistler* is selling as beneficiary. The testator's will contains no trust for sale, and in view of the time that has elapsed since his death, the executrix cannot make a good title without shewing that the sale is for the purpose of paying the testator's debts." The vendors replied as follows:—"*Sarah Lincoln* has been ascertained to be alive, but inasmuch as Mrs. *Whistler* is selling as executrix, *Sarah Lincoln's* concurrence is unnecessary. As a matter of fact a debt does exist, but the purchaser is not entitled to any evidence thereof, or to make the inquiry."

On the 31st of March, 1887, the purchase-money was ascertained to be the sum of £1596.

It was stated that *Sarah Lincoln* was of unsound mind.

There was no evidence that *Maria Whistler* had ever been in possession of the leasehold houses, or received for her own benefit any part of the rents or profits thereof.

This summons was taken out by *H. Richardson*, in the matter of the contract for sale and of the *Vendor and Purchaser Act*, 1874, asking that it might be declared that *Samuel Whistler* and *Maria* his wife were not entitled to assign one moiety of the hereditaments comprised in the contract as legal personal representatives of *Samuel H. Davis*, and that the concurrence of *Sarah Lincoln* in such assignment was necessary for the purpose of releasing the annuity bequeathed to her by the will of *Samuel H. Davis*, or that provision should be made for the annuity by a

payment into Court in pursuance of the *Conveyancing and Law of Property Act*, 1881, sect. 5, sub-sect. 1.

On the hearing of the summons in Chambers, the Chief Clerk was of opinion that the purchaser's contention was correct, and made an order in the terms of the summons, and the summons was then adjourned into Court at the vendors' instance.

E. Ford, for the purchaser:—

In the absence of evidence that there are debts of the testator remaining unsatisfied, the executrix, Mrs. *Whistler*, cannot sell in that capacity, but can only make a title as legatee with the concurrence of the annuitant. The case is within the rule laid down in *In re Tanqueray-Willaume and Landau* (1), that where twenty years have elapsed from the death of a testator there is a presumption that his debts are paid, and that after that period a person purchasing real estate charged with debts from the executor or devisee is put upon inquiry whether there are debts remaining unsatisfied. In the present case at the date of the contract, the twenty years had elapsed all but twelve days. It is submitted that the rule is not a hard and fast one.

[KAY, J.:—It is a hard and fast rule. The period of twenty years is taken because that is the period of limitation for a specialty debt.]

But in the present case there was no contract until the price was ascertained, and that was not done until after the twenty years had expired. Here the executrix is also specific legatee subject to the annuity, and the presumption after this long period of time must be that it is not necessary to resort to the specifically bequeathed property for payment of the testator's debts.

J. M. Stone, for the vendors:—

Mrs. *Whistler* can make a good title as executrix. *In re Tanqueray-Willaume and Landau* was the case of a sale of real estate charged with debts, and the rule there laid down does not apply to the case of an executor selling the personal property of his

(1) 20 Ch. D. 465.

KAY, J. 1887 *In re* WHISTLER.

testator. The powers of an executor over the testator's personal property are much wider than those of a trustee having a mere power to sell real estate for payment of debts. An executor has not merely to provide for the debts; there are many other purposes, *e.g.*, payment of expenses of administration, for which it may be necessary that he should deal with the testator's personal property. The argument and decision in *In re Tanqueray-Willaume and Landau* (1) went throughout on the question whether a sale of real estate could properly be made for payment of debts existing at the testator's death, and there was no question as to expenses subsequently incurred.

[KAY, J., referred to *Sabin* v. *Heape* (2), and *Wrigley* v. *Sykes* (3).]

In *In re Ryan & Cavanagh* (4) it was held, on the authority of *In re Tanqueray-Willaume and Landau*, that after seventeen years from the death of a testator his executrix had power to sell his leaseholds.

Moreover, the rule in *In re Tanqueray-Willaume and Landau* does not apply to the present case for the further reason that the sale took place before the twenty years had elapsed. The power to sell was exercised at the date of the contract. No doubt the contract was conditional, but a contract to sell lands is always conditional on the vendor shewing a good title.

[KAY, J., referred to *Tillett* v. *Charing Cross Bridge Company* (5).]

The act of ascertaining the price had relation back to the date of the contract, so that when the price was ascertained the contract became effectual as from its date: *London Guarantie Company* v. *Fearnley* (6); *Regent's Canal Company* v. *Ware* (7); *Fry* on Specific Performance (8).

Further, the rule in *In re Tanqueray-Willaume and Landau* only applies where a beneficiary is in possession. If this executrix had been in possession of the leaseholds in the character of

(1) 20 Ch. D. 465.
(2) 27 Beav. 553.
(3) 21 Beav. 337.
(4) 17 L. R. Ir. 42.
(5) 26 Beav. 419.
(6) 5 App. Cas. 911.
(7) 23 Beav. 575.
(8) 2nd Ed. pp. 150, 427.

specific legatee the requisition might have been a reasonable one; but there is no evidence to that effect, and the contrary is the fact.

[KAY, J., referred to *Cole* v. *Miles* (1).]

E. Ford, in reply.

KAY, J.:—

I think that this requisition is not a reasonable one. In the case of *In re Tanqueray-Willaume and Landau* (2) the Court of Appeal intimated that where a power is given by will to trustees to sell real estate for the payment of debts, when a period of twenty years has elapsed after the death of the testator, there is a presumption that the debts are satisfied; and therefore, after that time, it is reasonable for a purchaser to make a requisition that the trustees affecting to sell under the power should shew that the power is still subsisting. It is now attempted to apply that to the case of an executrix selling leasehold property which is specifically bequeathed by the will of her testator. Possibly there might be something to say for that contention if there were the slightest evidence that the executrix had assented to the bequest, and that the specific legatee of the leaseholds was in possession of them. But here there is not a trace of anything of that kind. The specific legatee of the leaseholds, subject to an annuity given by the will, is the executrix herself. That she ever took possession of the leaseholds as specific legatee, or that she ever received for her own benefit one farthing of the rents, or in any way treated herself as being beneficially interested, there is not a trace of evidence. In the first place I am not aware of any authority (I asked for one in the course of the argument, and I have looked so far as time would allow me to see if I could find any) that the doctrine that after twenty years from the death of a testator the power of the executor to sell personal estate must be considered to be at an end, has ever been applied by the Court in any case. I am not aware that the rule in *In re Tanqueray-Willaume and Landau* at all extends to the power of an executor to deal with the personal property of the testator. The

(1) 10 Hare, 179, 184. (2) 20 Ch. D. 465.

KAY, J.
1887
In re WHISTLER.

exercise by trustees of a mere power of sale, and the exercise by an executor of the right which the law gives him as executor to deal with assets vested in him in that character are two very different things, and unless I could find it so laid down by express authority, I should be very slow to say that after twenty years the Court must assume that an executor has lost his right to deal with the personal property of his testator. The suggestion is made, with which I entirely agree, that it is not merely the debts of the testator which the executor has to pay; he may have incurred expenses of administration and he may have to raise money by pledge or mortgage of the personal property of the testator, and these are matters for which it is essential that he should retain the power of dealing with the assets of the testator. Therefore it seems to me that the reason of the rule in *In re Tanqueray-Willaume and Landau* (1), that a power given to trustees to sell freehold estate for the payment of debts must be treated as *primâ facie* non-existent when twenty years from the date of the death of the testator have expired, is one which it is not at all necessary to apply to the case of an executor.

But supposing that the rule did so apply, I do not think that the present case is within it, because here the testator died on the 28th of March, 1867, and the contract was made on the 16th of March, 1887, that is, within twenty years after the death of the testator. It is true that the contract was not then complete, because the price had to be fixed, according to the terms of the contract, by a person named. But when the price was fixed, as it was on the 31st of March, 1887, why did not that relate back so as to make the contract binding from the beginning? For many purposes there is such a relation back, and I do not see why there should not be for this purpose. The power of the executrix to sell was exercised when the contract was made. The condition was not fulfilled until after the twenty years had expired, but the contract was made by the executrix at the date of it, and within the twenty years, and therefore, even if the rule in *In re Tanqueray-Willaume and Landau* could apply to the case of an executrix, yet, treating the contract as made before the twenty years had expired, it can

(1) 20 Ch. D. 465.

have no application to the present case. Again, the requisition by the purchaser was made within the twenty years, and that is another reason for not applying the rule.

It seems to me that I cannot treat this case as within the rule of *In re Tanqueray-Willaume and Landau* (1), and I base my decision mainly on this, that I do not think that rule is applicable to the case of an executor. Of course there may be cases where an executor is plainly selling the estate not to pay debts, or plainly selling property which is actually in the possession of a legatee, so that it is apparent that the bequest has been assented to, and in those cases it may be quite right to make such a requisition as was made here. But in this case I do not think the requisition can be supported, and I think the title is a perfectly good one. The summons must be dismissed with costs.

Solicitors: *Joseph Harwood*; *Stones, Morris & Stone.*

(1) 20 Ch. D. 465.

C. C. M. D.

CHITTY, J.

1887

May 16.

In re PYBUS.

[1886 P. 1757.]

Solicitor and Client—Taxation—Solicitors' Remuneration Act, 1881, *Gen. Ord., Sched. I., Part I.—Procuration Fee—6 & 7 Vict. c. 73, ss. 37, 41 [Revised Ed. Statutes, vol. ix., pp. 128, 132]—Taxation after Twelve Months—Special Circumstances.*

The charge by a mortgagor's solicitor to his client of a scale fee "for negotiating loan" in addition to the procuration fee according to the scale paid to mortgagee's solicitor, is an overcharge amounting to fraud so as to entitle the client to an order to tax on application more than a year after delivery of the bill; especially when coupled with the fact that the solicitor by whom the overcharge was made had not complied with his client's instructions to get the bill taxed.

ADJOURNED SUMMONS for taxation of a bill of costs amounting to £127 4*s.* 8*d.*, delivered by the solicitor, *W. M. Pybus*, to the Applicants, Mr. and Mrs. *Bell*, "and paid by the Applicants to the said *W. M. Pybus* by a retainer by the said *W. M. Pybus* out of the moneys of the Applicants" in his hands.

Pybus, who acted as solicitor for Mr. and Mrs. *Bell*, was employed by them to raise two sums of money upon mortgage, and on the 9th of July, 1885, sent *Bell* a cheque for £823 15*s.* 4*d.*, the balance of the amount obtained on mortgage after deducting his bill of costs (£127 4*s.* 8*d.*), together with an account shewing how such balance was arrived at, and also his bill of costs, the amount of which (£127 4*s.* 8*d.*) he had deducted. Mr. *Bell* complained of the amount of the bill, and a long correspondence followed in reference thereto. The solicitor consented to deduct £1 12*s.* 8*d.*, and sent his client a cheque for that amount, which the client did not return, though he wrote that he declined to accept it "in settlement of what I consider unreasonable charges.."

It appeared that *Bell* instructed *Pybus* to have the bill taxed by a letter to him of the 23rd of March, 1886, as follows:—

"Referring to our former letters requesting you to have the accounts taxed either by the Master or an independent person, I beg to say that we must now have this attended to and properly taxed by the proper authorities for doing so. I must ask you to arrange for this taxation at your earliest convenience."

To this letter no reply was sent, and *Pybus* took no steps to get the bills taxed though he continued to act as solicitor for Mr. and Mrs. *Bell* in other matters. On the 23rd of July, 1886, *Bell* instructed another solicitor, and on the 31st of July, 1886, a summons for taxation of the bill (as paid) was issued.

As a ground for taxation certain items of overcharge were alleged, and, in particular, that in addition to the usual procuration fee to the mortgagee's solicitor "for negotiating loan" as provided by the scale of charges in the Gen. Order (Sched. I., Part I.), under the *Solicitors' Remuneration Act*, 1881, the bill contained in each case the following item of charge calculated upon the scale: "Mortgagor's solicitor's fees for negotiating loan," £20. In reference to these items *Pybus*, in his affidavit, stated that he had told *Bell* that if he obtained the money (about which there had been considerable difficulty), his fee for negotiating the loan would be precisely the same as though he had been the mortgagee's solicitor, and *Bell* would therefore have a double fee to pay, to which *Bell* replied that he was willing to pay it. This, however, was denied by *Bell*.

Other items objected to were fees of £22 10*s*. for "deducing title, perusing mortgage, and completing as per scale fixed by the *Solicitors' Remuneration Act*, 1881," although no abstract was delivered; the transaction being not the obtaining of a fresh mortgage, but the substitution of one deed for another.

R. F. Norton, in support of the summons:—

The retention by *Pybus* out of money obtained for his client of the amount of his bill of costs is not payment within the meaning of 6 & 7 Vict. c. 73, s. 41: *In re Street* (1); *In re Stogdon* (2).

[CHITTY, J.:—Your summons states that the bill was "paid by the Applicants to the said *W. M. Pybus* by a retainer out of the moneys of the Applicants in the hands of the said *W. M. Pybus*."]

If we are precluded by the form of our summons from disputing the fact of payment, then we submit that the bill contains overcharges so gross as to amount to fraud, and thus to entitle

(1) Law Rep. 10 Eq. 165. (2) 56 L. T. (N.S.) 355.

CHITTY, J. 1887 *In re* PYBUS.

the Applicants to taxation notwithstanding the lapse of twelve months from payment of the bill. The charge, as a scale charge, of a procuration fee to the mortgagor's solicitor not being one of the charges mentioned in the scale, Sched. I., Part I., in the Gen. Ord. under the *Solicitors' Remuneration Act*, 1881, is a fraudulent overcharge; as also is the charge of a fee for deducing the title and perusing and completing the mortgage, where no abstract was delivered, and there was no investigation of title: *In re Lacey & Son* (1). It is alleged by *Pybus* that the charge of a procuration fee was assented to by *Bell*, but no agreement between a solicitor and his client respecting the amount of payment can be binding unless in writing and signed by both parties: *Attorneys and Solicitors Act*, 1870, s. 4.

F. H. Colt, for *Pybus*:—

If it be admitted, as it is by the terms of the summons, that there has been payment of the bill, then the application must fail. Even if the application had been made within twelve months after payment there are no special circumstances such as to entitle the client to taxation. As to the procuration fee it was no part of the duty of *Pybus*, as solicitor for the mortgagor, to negotiate the loan, and he is entitled to remuneration on the scale rate. The matter was one of trouble and difficulty, and although there was no actual delivery of an abstract there has been a deducing of title within the terms of the General Order: *Ex parte Mayor of London* (2). But even if the bill contains overcharges, and serious overcharges, that is not *per se* ground for taxation after twelve months. Special circumstances must be pressure and manifest overcharges, or overcharges so gross as to amount to fraud: *In re Lacey & Son* (3).

R. F. Norton, in reply.

CHITTY, J.:—

I think this bill ought to be taxed. The bill was delivered as it now stands rather more than a year before this summons to tax was taken out, and under such circumstances the general

(1) 25 Ch. D. 301. (2) 34 Ch. D. 452.
(3) 25 Ch. D. 301, 310.

rule as established by the cases is that in order to authorize taxation proof must be given of overcharges so gross as to amount to fraud. It is upon this rule that the case in support of the application has been based. Mere overcharge is not enough, as overcharges may have been made in error. There is also this circumstance, that eight months after the bill was delivered, there having been correspondence in the meantime, in the course of which objections were taken by the client to several items, the client himself tells the solicitor to get the bill taxed. The solicitor in effect refused to do so, and it is not until just after a year from the delivery of the bill had elapsed that the client instructed another solicitor to get the bill taxed. I am of opinion that the overcharges in this bill are of such a nature as to justify me in sending the bill for taxation notwithstanding the lapse of twelve months since it was delivered. The bill contains two items of £20 for "Mortgagor's solicitor's fees for negotiating loan" calculated upon the scale fixed by the *Solicitors' Remuneration Act*, 1881." In the scale of fees no such fee is payable to the mortgagor's solicitor. There may have been business done in negotiating the loan, for which the solicitor is entitled to charge in the ordinary way, but it is not work for which he could charge according to the scale. On that ground alone, as being an overcharge so gross as to amount to fraud within the meaning of the rule to which I have referred, I ought I think to direct taxation. Another point raised was that the scale fee was charged for "deducing title, perusing mortgage, and completing as per scale charge," whereas no abstract was delivered and there had been no deduction of title. I should be slow to order taxation on this ground alone as, in *In re Lacey & Son* (1), where a similar charge had been made, and there was no deducing of title, the Court of Appeal considered that although the bill was framed on an erroneous footing, and contained serious overcharges, there were no sufficient special circumstances to authorize taxation. But here the case with regard to delay is very peculiar. The Act (6 & 7 Vict. c. 73), s. 41, says nothing about overcharge amounting to fraud, which is a matter that has arisen by the construction of the Act, but authorizes the Court to direct taxation after

(1) 25 Ch. D. 301.

CHITTY, J. 1887 *In re* PYBUS.

payment "if the special circumstances of the case appear to require the same." I am, therefore, entitled to take into consideration all special circumstances, and in this case I am bound to say that there are special circumstances. The delay in making this application has been caused by the solicitor not taking any steps to get the bill taxed when required by his client to do so, and by his not having written to say that he would not submit to have his bill taxed. This, in my opinion, is a special circumstance which might justify taxation. The result, therefore, is that I direct taxation of the bill, but Mr. *Pybus* will be at liberty to carry in a detailed bill as to the procuration fees and also as to the £22 10*s.* if the Taxing Master thinks that it is not covered by the scale allowance. The costs of the summons to follow the result of the taxation.

Solicitors: *Pattison, Wigg, & Co.*, for *H. E. Richardson, Newcastle-on-Tyne; Nash, Field, & Withers*, for *W. M. Pybus, Newcastle-on-Tyne.*

F. G. A. W.

ATTORNEY-GENERAL *v.* BARRY DOCKS AND RAILWAY COMPANY.

NORTH, J.
1887
Jan. 14.

[1886 A. 1701.]

Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 53 [*Revised Ed. Statutes, vol. ix., p.* 720]—*Diversion of Road.*

Sect. 53 of the *Railways Clauses Consolidation Act*, 1845, applies to a permanent diversion as well as a temporary diversion of a road.

THIS action was brought at the relation of the *Pontypridd* District Highway Board, to restrain the Defendant company from using a part of their railway on the site of a part of the *Llantwit Road*, where it had been diverted for the purpose of the Defendants' railway, until the Defendants should have caused to be made and appropriated for the use of the public a sufficient road as safe and as convenient for passengers and carriages as the old road was, or as near thereto as might be; and also to restrain encroachment at another part of the road.

The Defendants' railway was authorized to be constructed by the *Barry Dock and Railways Act*, 1884. By that Act it was provided that the company might divert, alter, or stop up in the manner shewn on the deposited plans and sections any roads shewn on the plans as intended to be diverted, altered, or stopped up. By the deposited plans and sections it was shewn that they intended to divert the *Llantwit Road* at the place where they had since diverted it. The Defendants had substituted a new road for the part of the road they had stopped up, in accordance with the deposited plans and sections. But it was alleged by the relators that the new road, which was cut out of the side of a hill, was insufficient and dangerous by reason of the stones that fell on to it from the freshly-cut side of the hill, which was of shale.

This was a motion for an interlocutory injunction.

Cozens-Hardy, Q.C., and *S. B. L. Druce*, for the highway board:—

The injunction asked with regard to the diverted road is in order to enforce the provisions of the 53rd section of the *Railways*

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Clauses Consolidation Act, 1845. A similar injunction has been granted in *Attorney-General* v. *Widnes Railway Company* (1); *Attorney-General* v. *Great Northern Railway Company* (2).

Cookson, Q.C., and *Kenyon Parker*, for the Defendant company:—

Sect. 53 of the *Railways Clauses Act* only applies to a temporary diversion of a road: *Tanner* v. *South Wales Railway Company* (3); *Attorney-General* v. *London and Southampton Railway Company* (4). It is clear from sect. 56, which also relates to a temporary diversion, that the two sections relate to the same kind of diversion.

Cozens-Hardy, in reply:—

Tanner v. *South Wales Railway Company* was not the case of a diversion of a public road, but of a tramway. *Attorney-General* v. *London and Southampton Railway Company* was decided on the words of a different Act of Parliament and has no application.

Sect. 56 is supplemental to sect. 53, and, reading the two sections together, it is clear that the case of a permanent diversion is included in both the sections.

NORTH, J.:—

It has been suggested that the 53rd section of the *Railways Clauses Consolidation Act* only applies to a case where there is a temporary diversion of the road, as distinguished from a complete diversion, but the case which was referred to as throwing light on that subject seems to me in reality not to touch that point at all; and looking at the 56th section, following the 53rd, both of which are parts of the same set of sections, or the same fasciculus of clauses, as it is sometimes called—it seems to me that the 53rd section does apply to the diversion contemplated by this case so far as the special Act does not apply, although the diversion when once completed is intended to be permanent and not temporary.

Then, the question is whether, the line of diversion being

(1) 22 W. R. 607.
(2) 4 De G. & Sm. 75.
(3) 5 E. & B. 618.
(4) 9 Sim. 78.

authorized, the diversion is right in other respects, in accordance with sect. 53. Now, what is considered to entitle the public to some substitution or diversion is this—"If in the exercise of the powers of the Act it is found necessary" (that is by the *Railways Clauses Act* or by the special Act) "to cross, cut through, raise, sink, or use any part of any road . . . so as to render it impassable for or dangerous or extraordinarily inconvenient to passengers or carriages, or to the persons entitled" to use it, then a substituted road shall be made. It seems to me absurd to say that an old road cannot be used so as to render it dangerous until after a substituted road has been made, if, in point of fact, the new road, when made, might be left as dangerous as the old road. It follows from the language used in the 53rd section that the road to be substituted must at any rate not be a dangerous road. I pass over the other words of the section because it is not necessary further to consider them, inasmuch as there is ample evidence to shew that, at any rate at certain times of the year, in certain conditions of weather—such as have lasted for some time this winter, and, so far as I see, are not over yet—for certain periods at any rate the road is in such a state that it is dangerous for persons to use it. Under those circumstances it appears to me that the section applies.

Then, the question is, what injunction can be granted? The injunction to be granted would be to restrain the Defendants from using the old road without providing a substituted road in accordance with sect. 53, and it seems from the case of *Attorney-General* v. *Great Northern Railway Company* (1) that an injunction of that sort would have the effect of preventing the company running their trains over the line of railway that they have opened along the site of the original highway. Therefore, in granting an injunction I do not restrain the Defendants from allowing their embankments or their rails, or whatever may be upon them, to remain where they are. I do not order those to be removed, but I must restrain the Defendants from using the railway upon the site of the old road until they have substituted a proper road under sect. 53.

But as regards that it appears to me that I might unnecessarily

(1) 4 De G. & Sm. 75.

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inflict a hardship upon the company by granting an injunction in that shape: and if the company accept the view that I take, that they are bound to so alter the sides of the road as to prevent their being dangerous, and if they will undertake to do so, I will not stop their works in the meantime by an injunction to restrain them from the use of the road while they are making the necessary alterations. That is a matter for them to consider.

In the result the injunction was suspended till after the hearing of an appeal, the Defendants undertaking, without prejudice to their right of appeal, forthwith to do certain work to the slope above the new road for the purpose of preventing immediate danger, and to prosecute any appeal with all reasonable despatch.

An appeal was presented, and on coming into the paper was withdrawn.

Solicitors: *I. H. Wrentmore*, agent for *Spickett & Sons, Pontypridd; Downing, Holman & Co.*, agents for *Downing & Handcock, Cardiff.*

D. P.

NORTH, J.
1887
April 23.

In re DISTRICT BANK OF LONDON.

Company—Winding-up Petition—Withdrawal by Petitioner—Costs.

As a general rule a Petitioner who withdraws his petition for the winding-up of a company will be ordered to pay the costs of the parties appearing. But the rule is not an inflexible one, and the Court will have regard to the circumstances of each case.

PETITION by a shareholder for the compulsory winding-up of the above company.

The petition was presented on the 14th of February. It contained the following allegations:—"Your Petitioner has been informed and believes that the directors are about to call a meeting with a view to passing resolutions for the voluntary liquidation of the company, but that there is great reason to fear that, in consequence of certain internal dissensions which in fact exist amongst the members of the company, it is quite possible

that the board will fail to carry such resolutions by the requisite majority, notwithstanding that, as your Petitioner is informed and believes, the greater part of the members are agreed that the company ought to be wound up either voluntarily or by the Court. Your Petitioner has presented this petition in the interest and for the protection of the holders of the greater portion of the shares in the company, and at their request, and in the event of resolutions for a voluntary liquidation being carried, but only in that event, your Petitioner will be willing, subject to the permission of this Honourable Court, to withdraw this petition."

On the 1st of March, a meeting of the shareholders was held, and resolutions to wind up voluntarily were passed. The petition was in the paper for hearing on the 14th of March, when it was ordered to stand over to the 19th of March, in order to see whether the resolutions should be confirmed at a second meeting which was called for the 17th of March. At that meeting the resolutions were confirmed.

Copies of the petition were taken by several shareholders, but they were informed by the Petitioner's solicitors that the petition would be withdrawn in case resolutions for a voluntary winding-up should be passed, and that, in that case, if they appeared at the hearing, the Petitioner would oppose the allowance of costs to them.

The petition came on for hearing on the 23rd of April.

P. B. Abraham, for the Petitioner, stated that, as a voluntary winding-up had now been resolved on, he desired to withdraw the petition, but he submitted that, under the circumstances, he ought not to be ordered to pay any costs.

Willis-Bund, for the company, did not oppose.

Eve, for shareholders who had taken a copy of the petition, did not dispute the truth of the allegations contained in it, but urged that the practice was to order a Petitioner who withdrew his petition to pay the costs of the parties who appeared on it. He asked, in the alternative, that a supervision order might be made.

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Napier Higgins, Q.C., *amicus Curiæ*, referred to *In re Home Assurance Association* (1); *Buckley* on the *Companies Acts* (2).

NORTH, J.:—

I do not understand that there is any absolute rule that when a Petitioner for a winding-up order dismisses his own petition, it must necessarily be dismissed with costs. It will no doubt as a general rule be dismissed with costs, but this must depend on the circumstances of the case. The object of the petition in the present case was to put a stop to dilatory proceedings of the company, and to protect the assets. Now that the shareholders have resolved upon a voluntary winding-up, the Petitioner wishes to be allowed to withdraw his petition, and under the circumstances I think it will be fair to allow him to do so, without ordering him to pay the costs of the shareholders who appear. And I do not think that those shareholders are entitled to a supervision order merely to enable them to obtain payment of their costs out of the assets.

Solicitors for Petitioner: *Farrer & Co.*
Solicitors for company: *Wright & Wright.*
Solicitors for shareholders: *J. S. Rubinstein.*

(1) Law Rep. 12 Eq. 59. (2) 4th Ed. p. 202.

W. L. C.

In re TUNNEL MINING COMPANY.

NORTH, J.

1887

April 29.

POOL'S CASE.

Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628]—*Construction*—"*At or before.*"

A contract for the issue of shares as fully paid up was given to the allottee late in the day for the purpose of his getting it filed with the Registrar of Joint Stock Companies, together with a certificate of the shares. The contract was filed on the following morning:—

Held, that the contract was filed "at the time of" the issue of the shares, and they were to be deemed fully paid up.

THIS was a motion in a voluntary winding-up to remove the name of *William Pool* from the list of contributories in respect of 1000 £1 shares unpaid. *Pool* had contracted with the company to sell them certain mining property at the price of £1500, to be paid for as to £500 in cash, as to the other £1000 in 1000 fully paid-up £1 shares. He attended a meeting of the directors of the company on the 12th of April, 1886. A contract for the issue of the shares to him was executed on behalf of the company, and was handed to him for the purpose of his getting it filed with the Registrar of Joint Stock Companies. At the same time a certificate of his being the holder of 1000 fully paid-up shares was given to him. On the afternoon of the same day (12th of April, 1886) *Pool* went to his solicitor, and was advised by him to get the shares cancelled, and have shares re-issued to him after the contract should have been filed with the Registrar of Joint Stock Companies. It was then too late in the afternoon to get the contract filed on that day, but it was filed on the following morning. *Pool* took some steps to get his shares cancelled, but he never gave up the certificates which had been given to him.

Grosvenor Woods, for the motion:—

There was a duty cast on the company as between themselves and *Pool* to get the contract filed before issue of the shares: *Mudford's Claim* (1). The delivery of the certificate is not that

(1) 14 Ch. D. 634, 637.

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which absolutely settles when the time of issue is; every case is to be considered in connection with the particular circumstances: *Clarke's Case* (1). Taking into consideration the duty of the company and the manifest intention of the parties to comply with the law, the Court will hold that no issue of shares took place till after the filing of the contract.

Bramwell Davis, for the liquidator:—

The test of when shares are issued is the consideration of what time the allottee has dominion over them: *Blyth's Case* (2); *Clarke's Case*. *Pool* had complete control of the shares when the certificate was handed to him; the contract was not registered till after that. The fact that the transaction was *bonâ fide* and there is hardship is immaterial: *Barrow's Case* (3). The question is not between the company as a going concern and the allottee; a winding-up having intervened, it is too late to go into the question as against the company only: *Burgess's Case* (4).

NORTH, J.:—

I do not call on you, Mr. *Woods*, because I see my way to decide in accordance with what was the clear intention of all the parties.

It is clear that the intention was that *Pool's* land was to be exchanged for £500 in money and 1000 fully paid-up shares; and there was no intention that *Pool* should be under any liability in respect of those shares. That would have been all perfectly right and correct but for the provision of sect. 25 of the *Companies Act*, 1867, which provides: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash." Land is not cash, and the shares would be considered as unpaid; but there is this exception: "unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." Now at the meeting of the 12th of April, 1886, the

(1) 8 Ch. D. 635.
(2) 4 Ch. D. 140.
(3) 14 Ch. D. 432.
(4) 15 Ch. D. 507.

agreement for the issue of shares duly made in writing, which it was the common intention should be duly filed, was handed to *Pool* for the purpose of his proceeding to get it filed with the Registrar. Unluckily, after he got to his solicitor there was not time to get the contract filed on the same day, and it was not actually filed till the following morning. The question is, whether there was a contract following the words of the section, "filed with the Registrar at or before the issue of such shares." Now the word "at" seems to me very important; I do not think that it means the same as "before." It is impossible to suppose that what is meant is a registration at the office at the very moment of time at which the shares are issued, but I think what is contemplated is that the issue of shares and the filing of the contract should be substantially part of one and the same transaction. As Lord Justice *Thesiger* says in *Clarke's Case* (1): "There is no magic to be attributed either to an allotment or to the issue of certificates, but in each case the Court must look at all the circumstances of the case, and see whether practically and substantially there has been an issue of shares at a time when there was not a contract registered under the section to which I have referred." I may put a case for example: supposing parties had met for the purpose of carrying out a contract for the issue of paid-up shares, and had postponed the actual issue for half-an-hour to enable them to send a person to get the contract registered in the meanwhile; and supposing other business to have been done in the meantime, and precisely at the end of half an hour the shares to have been issued; if, instead of getting the contract registered within the half-hour the messenger had been detained for an hour, or had loitered on the way, and the contract was not registered till half-an-hour after the actual issue of the certificate—it seems to me that would have been immaterial; and the contract would have been considered registered at the time of the issue. If, in point of fact, in this case *Pool* had gone straight off to the public office and registered the agreement on the same day, so that the registration had appeared to be on that day, I do not think any one would have raised a question. It would have been substantially one

(1) 8 Ch. D. 642.

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transaction, and whether the certificate were handed over before or after registration would have been immaterial. That this happened at an hour after which registration on the same day was impracticable ought not to affect the question. The registration was in substance at the issue of the shares, although not completed till the following morning. Under the circumstances, I come to the conclusion that *Pool* is entitled to have the shares treated as paid-up shares, and I grant the application with costs.

Solicitors: *Snell, Son & Greenip*; *Edward Smith & Co.*

D. P.

STIRLING, J.

1887

March 29; April 4.

In re MONK. WAYMAN *v.* MONK.

[1883 M. 419.]

Ecclesiastical Dilapidations Act, 1871 (34 & 35 *Vict. c.* 43), *ss.* 34, 36 [*Revised Ed. Statutes, vol. xvi., p.* 679]—*Dilapidations—Claim by succeeding, against Estate of deceased, Incumbent—Payment pari passu with Debts of other Creditors.*

Where the Bishop has, under sect. 34 of the *Ecclesiastical Dilapidations Act*, 1871, made an order stating the cost of the repairs for which the executors of a late incumbent are liable, the sum so stated is under sect. 36 a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors.

THIS was a creditor's action for the administration of the estate of a deceased incumbent of a benefice.

The Rev. *J. Napleton*, who succeeded the testator as incumbent of the benefice, obtained from the bishop an order under the 34th section of the *Ecclesiastical Dilapidations Act*, 1871, stating the repairs for which the testator was liable in respect of the buildings of the benefice, and fixing the costs of such repairs at the sum of £320 8*s*. He then carried in a claim in the action for this £320 8*s*.

The Chief Clerk in the course of the proceedings made a certificate in which he allowed the claim; but he considered that the executors would not be justified in paying it until they had satisfied all the other debts of the testator, upon the ground that the law in this respect had not been altered by the *Ecclesiastical Dilapidations Act* of 1871; and the question now argued was whether the claim was payable out of the assets of the testator *pari passu* with the debts of his other creditors or should be postponed to them.

W. Pearson, Q.C., and *Rawlinson*, for the Rev. *J. Napleton*, in support of the claim:—

The claimant is entitled to be paid the amount of his claim *pari passu* with the other creditors of the testator.

Before the passing of the *Ecclesiastical Dilapidations Act*, 1871, by a custom, which was part of the common law of *England*, the

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incumbent of a benefice was under an obligation to repair the buildings belonging thereto; and if he failed to do so, the remedy of his successor, after his death, was by an action sounding in damages of an uncertain amount against his executors, who were accordingly bound to satisfy all his simple contract debts before paying for the dilapidations.

The Act altered both the liability and the remedy. Under the 34th section the Bishop makes an order stating the amount for which the late incumbent is liable in respect of repairs, and under sect. 36 the sum so stated is made "a debt" due from the late incumbent to the new incumbent, "and shall be recoverable as such at law or in equity." It is therefore certain, liquidated, and recoverable as such; and the succeeding incumbent has a right to prove against the estate of the preceding incumbent in respect of the statutory debt thus created and to be paid *pari passu* with the other creditors of the deceased.

[They referred to *Jones* v. *Hill* (1); *Wheatley* v. *Lane* (2); *Ross* v. *Adcock* (3); *Bryan* v. *Clay* (4); *Mason* v. *Lambert* (5); *Sollers* v. *Lawrence* (6); *Bird* v. *Relph* (7); *Wise* v. *Metcalfe* (8); *Bunbury* v. *Hewson* (9); *Huntley* v. *Russell* (10); *Kimber* v. *Paravicini* (11); *Phillimore's Burns*, title "Dilapidations" (12); *Williams* on Executors (13).]

Hastings, Q.C., and *E. Ford*, for creditors who had the conduct of the action:—

Under the old law claims for dilapidations were postponed to simple contract debts: and the object and effect of the Act of 1871 was not to alter the character of a debt for dilapidations, or to give to such a debt a rank or priority which it did not previously possess, but only to provide more convenient machinery for securing it. The postponement therefore still continues.

[They cited *Bisset* v. *Burgess* (14) and *Wright* v. *Davies* (15).]

(1) 3 Lev. 268.
(2) 1 Wms. Saund. 216 b (6th Ed.).
(3) Law Rep. 3 C. P. 655.
(4) 1 E. & B. 38.
(5) 12 Q. B. 795, 800.
(6) Willes, 413, 421.
(7) 4 B. & Ad. 826; 2 Ad. & E. 773.
(8) 10 B. & C. 299.
(9) 3 Ex. 558, 562.
(10) 13 Q. B. 572.
(11) 15 Q. B. D. 222, 225.
(12) Ed. of 1842, vol. ii. p. 146 a.
(13) 4th Ed., p. 1717.
(14) 23 Beav. 278.
(15) 1 C. P. D. 638.

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This case raises the question whether a sum of money found by an order made under sects. 34 and 35 of the *Ecclesiastical Dilapidations Act*, 1871, stating the amount of the costs of repairs to the buildings of a benefice for which the legal personal representatives of the late incumbent are liable, is payable out of his assets *pari passu* with his other debts. Prior to the passing of the Act the law as to sums payable by the legal personal representatives of a late incumbent of a benefice to his successor stood in a somewhat peculiar position. It had been established that an action on the case for dilapidations would lie against the predecessor in his lifetime or his legal personal representatives after his death; and the principle upon which such an action was maintainable is thus stated by Lord *Denman* in *Mason* v. *Lambert* (1): "The principle is stated by Chief Justice *Willes* in the case of *Sollers* v. *Lawrence* (2); and, whether against the predecessor in his lifetime, or his personal representative after his death, it is this: that the maintenance of the houses, buildings and other premises belonging to the benefice is a duty which the law casts on the incumbent because he enjoys the benefit. If he neglects to perform it, he is guilty of no civil tort in his lifetime to any one; not to himself of course, the present occupier; not to an unknown successor in whom is no interest; not to the patron, in whom the common law recognizes no such personal interest in the lands, goods, or chattels of the church of which he is patron that any action will lie for him against the incumbent for spoil or waste, actual or permissive. Further, if the incumbent were guilty of a tort, the action for it would have died with him, and would not have survived against his executors at the time when this mode of proceeding was first sanctioned in the Common Law Courts. It is true this last remark does not apply in a case between predecessor and successor; but it has never been suggested that the character or foundation of the action is different in this case from that in which it is brought against the executor. It is indeed an anomalous action, which did not obtain a settled allowance in our Courts till after the case of *Jones* v. *Hill* (3), (2 Wm. & M.); and no judgment

(1) 12 Q. B. 795, 799. (2) Willes, 413, 421.

(3) 3 Lev. 268.

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would seem to be of less authority in itself than the one there pronounced: the Chief Justice, *Pollexfen*, was strongly against it; the Court inclined to his opinion; it was ordered for further argument; then, the Chief Justice and *Ventris* being dead, *Powell* and *Rokesby* gave judgment for the plaintiff. However it is now" (July 12, 1848) "unquestionably maintainable." In a note to *Wheatley* v. *Lane* (1) it is pointed out by the learned editor that the form of the action is in tort, and that it cannot possibly bear the form of assumpsit as on a contract; and that it is an exception to the general rule that no action will lie against an executor to which his testator was not liable, "for the testator," it was said, "never can be liable, inasmuch as during his life there is no person who can sue. For the same reason," continues the learned author, "this action, however anomalous in other respects, is not contrary to the rule, that *actio personalis moritur cum personâ*: an action cannot be said to die, which never had nor could have had existence."

In *Bryan* v. *Clay* (2) it was held that an executor was bound to satisfy simple contract debts before paying for the dilapidations of his testator. The reasons for that were given at considerable length by all the learned Judges, but I will read only from the judgment of *Wightman*, J., who states in three sentences that which was more enlarged upon by the other Judges. He says (3), "This action is framed, not on the general law of the land, but on a custom which has become part of the common law. The first authority for the action is Sir *Simon Degge*, who makes the postponement of the claim incidental to the custom, and a part of it, as all subsequent writers do: and there is no authority the other way. The declaration is founded especially on the custom: and therefore all the incidents of the custom attach." It thus appears that, previously to the statute, dilapidation on the part of a deceased incumbent created, not a debt, but a liability to damages which his legal personal representatives were bound to satisfy out of his assets after payment of simple contract debts. In this state of things the Act of 1871 was passed, and the preamble recites that "as well for the

(1) 1 Wm. Saund. 216 b. (6th Ed.). (2) 1 E. & B. 38.
(3) 1 E. & B. 53.

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In re MONK.

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better sustentation of houses of residence, chancels, and other buildings which incumbents of ecclesiastical benefices and other ecclesiastical persons are by law or custom bound to maintain in repair, as also for the relief of such persons and their representatives, it is expedient to amend the law relating to ecclesiastical dilapidations." Then the sections to which it is more material for the purpose to refer are those beginning with sect. 29. [His Lordship read sects. 29, 34, 36, 37, and 40, and continued:—] Then the Act provides for the extension of the time within which the payment by the new incumbent is to be made, and that the repairs are to be executed within eighteen months. [His Lordship read sects. 43, 53, and 60, and continued:—] The claimant in the present case has strictly pursued the course pointed out by the Act, and has obtained an order under sect. 34, and he now seeks to prove against the estate of the deceased incumbent in respect of the statutory debt created by sect. 36. On the other hand it is contended that although the claimant is entitled to prove on the footing of being a creditor, still his debt ought to be postponed to the other debts of the deceased incumbent just as a claim in respect of a liability under the old law would have been; and it is said that the Act has not altered the rights or liabilities of persons in respect of dilapidations, but has merely provided a more convenient machinery for enforcing the claim. The preamble of the Act, however, points to an amendment of the law "for the better sustentation of houses of residence, chancels, and other buildings which incumbents of ecclesiastical benefices and other ecclesiastical persons are by law or custom bound to maintain in repair." And, in fact, the statute does appear, in some respects at all events, to have effected a substantive alteration in the law. For example, as was pointed out by the late Master of the Rolls, Sir *George Jessel*, in *Wright* v. *Davies* (1), under the old law the new incumbent (against whom no action for dilapidations would lie) having recovered a large amount for dilapidations, not being bound in any way to apply it for the benefit of the living, might have put it into his own pocket. But now by sect. 37 of the Act when he has recovered the amount he is not to be allowed to put it into his own pocket, but is bound to pay it over to the Governors of *Queen Anne's*

(1) 1 C. P. D. 638, 650.

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Bounty, and by sect. 40 he is bound within six calendar months after the date of the order, or such further time as may be granted, to pay to the Governors of *Queen Anne's Bounty* such further sum as will make up the sum stated in the order as the cost of the repairs, and if he fails to do so then, under sect. 43, the amount may be raised by sequestration of the profits of the benefice; and further, by sect. 60 every sum of money raiseable by sequestration is to be deemed a debt due from and payable by the incumbent. Now if the postponement of the satisfaction of the liability which existed under the old law to simple contract debts of the deceased incumbent had been founded on any basis of reason, if for example the postponement could have been referred to any inherent want of merit in this particular liability, as compared with the other liabilities of the deceased incumbent, it might possibly be right to hold that the postponement continued as long as the reason on which it was founded remained in force. But upon examination it is found that the postponement was simply founded on a custom which had become part of the common law, and was in truth an anomalous incident of a right which was itself an anomaly. The Legislature has, to use an expression of the late Master of the Rolls, "remodelled the law" by providing in effect that "the new incumbent is to have an action of debt for the amount which the surveyor has reported." The Act has practically abolished the action for damages under the old law by sect. 53, and has provided by sect. 36 that the amount stated in the order as the cost of the repairs shall be a debt due from the late incumbent or his representatives to the new incumbent, "and shall be recoverable as such both at law and in equity." I cannot see why that debt thus created by statute should be treated as having annexed to it the anomalous incidents which attached to the right to damages which it has superseded, or why a debt which is expressly made recoverable as such at law and in equity should not be payable and paid in the same way as any other debt. I conclude on the whole that the Legislature has in this respect as in others altered and amended the law, and I am of opinion that the claimant is entitled to come in and prove his debt, and to be paid *pari passu* with the other creditors.

Solicitors: *Crosse & Sons; John W. Sykes.*

W. W. K.

In re SMITH'S ESTATE. CLEMENTS *v.* WARD.

STIRLING, J.

1887

March 17; *April* 21.

[1886 S. 4549.]

Statute (43 *Geo.* 3, *c.* 108) [*Revised Ed. Statutes, vol. iv. p.* 332] *for promoting the erection of Churches—Married Women, without their Husbands, excepted—Married Women's Property Act*, 1882, *s.* 1, *sub-s.* 1—*Gift by a Married Woman, by Will, towards the erection of a Church, invalid.*

Under the statute 43 Geo. 3, c. 108, which contained a power to all persons having an interest in any lands or in any goods or chattels to give by deed enrolled, or will executed, three months before death, lands not exceeding five acres, or goods and chattels not exceeding in value £500, for or towards the erecting of any church, with a proviso that the Act should not extend to any persons being within age, nor women covert without their husbands to make any such gift:—

Held, that the proviso was not affected by the *Married Women's Property Act*, 1882, which by sect. 1, sub-sect. 1, gave power to married women to dispose by will of any real or personal property as her separate property in the same manner as if she were a *feme sole*.

Consequently a gift by a married woman, by will executed three months before death, to the vicar and churchwardens of a church of a sum of £300 to be applied by them in the erection of a new church, and to be paid out of personal estate which was legally applicable for the purpose was held to be invalid.

MOTION.

Elizabeth Shaw Smith (of *Sparkhill*, in the county of *Warwick*), who died on the 16th of February, 1886, the wife of *John Smith*, to whom she was married before 1870, by her will, made on the 10th of February, 1885, after bequeathing certain charitable legacies, gave "to the vicar and churchwardens for the time being of *Saint John's Church, Sparkhill*, the sum of three hundred pounds, such sum to be applied by them in the erection of a new church. I direct that the said several legacies shall be paid free from legacy duty out of that part of my personal estate which is legally applicable for that purpose." The testatrix then devised and bequeathed all her real and residuary personal estate unto her husband and two other persons upon trust for the benefit of the persons named in the will. The testatrix made a codicil to her will on the 16th of July, 1885, by which

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she appointed *Samuel Mould* to be a trustee in the place of *James Marigold*, deceased; and made alterations in the gifts to some of the legatees, but the gift to the vicar and churchwardens was not referred to. The will and codicil were proved by the surviving husband on the 3rd of April, 1886. It appeared that a piece of land was in 1877 appropriated as a site for a new church; that thereon an iron church had been erected; that the Rev. Mr. *Ward* had been duly licensed to the district and that from that year down to the present time there had been public worship according to the rites of the Church of *England* in the church.

An originating summons was taken out by the vicar and churchwardens asking for a declaration that the legacy to them was valid, and the Judge in Chambers declared that it was invalid.

This was a motion to vary the order made in Chambers.

Swinfen Eady, for the Vicar and Churchwardens:—

There is a sufficient indication in the will that the sum shall be expended in the erection of a church upon land in mortmain. The important question arises upon the Act 43 Geo. 3, c. 108, which was passed on the 27th of July, 1803, "to promote the building, repairing, or otherwise providing of churches and chapels, and of houses for the residence of ministers, and the providing of churchyards and glebes," and which by sect. 1, after stating that churches and chapels were wanting in many parts of *England* and *Ireland*, and that many well-disposed persons would be desirous of contributing towards the supply of such defects if they were enabled so to do, enacted "that all and every person and persons having in his or their own right any estate or interest . . . . in any lands . . . . or of any property of or in any goods or chattels, shall have full power, licence, and authority, at his and their will and pleasure," by deed enrolled as therein mentioned, "or by his, her, or their last will, or testament in writing duly executed . . . . three calendar months at least before the death of such grantor or testator . . . . to give, and grant to, and vest in any person or persons . . . . all such his, her, or their estate, interest, or property" in lands "not

exceeding five acres, or goods and chattels . . . . not exceeding in value £500, for or towards the erecting . . . . or providing any church or chapel . . . . Provided always, that this Act or anything therein contained, shall not extend to enable any person or persons being within age or of non-sane memory, nor women covert without their husbands to make any such gift, grant, or alienation; anything in this Act contained to the contrary in anywise notwithstanding." There was power given to the person and persons, &c., to accept the gift, and there was a proviso that nothing in the Act should be construed to take away or abridge any right of giving or devising which already existed in any person whatsoever. My contention is, that the provision in that Act in reference to women covert has been expressly or impliedly repealed by the *Married Women's Property Act*, 1882 (45 & 46 Vict. c. 75), which by sect. 1, sub-sect. 1, enacted that "a married woman shall, in accordance with the provisions of this Act, be capable of . . . . disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." The Court not only can, but is bound to hold that that proviso in the Act of 1803 has been repealed. There should be a liberal construction of the Acts. There have been many cases under the Act of 1882 as to what is a married woman's separate property, and the rights she has over it? The Act has been always construed broadly, and liberally in favour of married women. They have no doubt much larger powers than under the *Married Women's Property Act* of 1870 (33 & 34 Vict. c. 93). The absolute legal and equitable ownership of property have been vested in them. The Act of 1882 made them spinsters, and they have the same power of disposition as if unmarried. By sect. 50 of the *Settled Estates Act*, 1877 (40 & 41 Vict. c. 18), a married woman applying to the Court had to be examined, but such an examination is not now necessary in the case of a woman married since the Act of 1882: *Riddell* v. *Errington* (1). Then as regards the 7th section of the *Statute of Limitations* (21 Jac. 1, c. 16), a woman married prior to the Act of 1882 has been by the Act made discovert, and has been enabled to bring an action for slander, within the

(1) 26 Ch. D. 220.

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limit prescribed, for a cause which accrued many years previously to the passing of the Act: *Weldon* v. *Neal* (1). The decision in *Lowe* v. *Fox* (2) is to the same effect in regard to an action for assault and false imprisonment. A married woman having been released from incapacity as regards the bringing of actions, how can it be said that she has not been released in reference to the disposition of her property. She can make her own election touching her property, and is not now bound to submit it to the Court: *Re Queade's Trusts* (3). In *Weldon* v. *De Bathe* (4) a distinction was drawn between the Act of 1870 and the Act of 1882, but now a married woman can give an undertaking for damages, and is not liable to give security for costs: *Threlfall* v. *Wilson* (5), and the husband need not join in the administration bond: *In the Goods of Harriet Ayres* (6). The effect of all the decisions is, that a very wide interpretation has been put upon the Act of 1882, and the Court should hold that the power of disposition by will of property extends to a gift to provide for a church, as if the testatrix had been unmarried; that she was discovert within the meaning of the proviso in the Act of 1803. Alienation by a married woman where not restrained, is incident to separate estate, and can be effected by instrument *inter vivos*, or will: *Taylor* v. *Meads* (7). I submit that the gift is valid.

W. Pearson, Q.C., and *Bardswell*, for the residuary legatees:—

The *Mortmain Act* (9 Geo. 2, c. 36) applied to all persons, but the 43 Geo. 3, c. 108, made an exception for a particular purpose. The Act of 1882 applies to three classes of married women: those married before 1870, which was the case of the testatrix; those married between 1870 and 1883, and those married subsequently. Under the Act of 1882, sect. 1, dispositions by married women are to be in accordance with the provisions of the Act, and women married before 1870 having property not given to them for their separate use, but falling into possession, have no more power of disposition than before 1870; and sect. 5 of the Act of 1882

(1) 32 W. R. 828.
(2) 15 Q. B. D. 667.
(3) 53 L. T. (N.S.) 74.
(4) 14 Q. B. D. 339.
(5) 8 P. D. 18.
(6) Ibid. 168.
(7) 4 D. J. & S. 597.

shews that they have not a general power of disposition. They are enabled to dispose of their separate property "the title to which . . . . shall accrue after the commencement of the Act on the 1st of January, 1883;" and sub-sect. 1 of sect. 1 is not to have that very wide interpretation which has been contended for. The *Statute of Limitations*, 21 Jac. 1, c. 16, has nothing to do with a case like this, as it does not deal with rights, but with time within which to bring actions. Sect. 1, sub-sect. 2, and sect. 12 of the Act of 1882 gave certain remedies to married women, and under them the actions referred to were brought. The authorities which have been cited have not the slightest bearing upon the case. The Court has to go back to the *Statute of Mortmain*, which prohibited such a gift as this, and then to consider the provisions of 43 Geo. 3, c. 108, which allowed it, but which excepted married women "without their husbands'" consent. This property belonged to the testatrix prior to 1870. It is submitted that the declaration made in Chambers was perfectly right, and that the motion should be dismissed.

W. Phipson Beale, for the executors.

Swinfen Eady, in reply.

STIRLING, J. (after stating the facts, continued):—

Under the Act 9 Geo. 2, c. 36, commonly known as the *Statute of Mortmain*, it was admitted that this legacy was invalid. Subsequently to the passing of that statute the Act 43 Geo. 3, c. 108, was passed, which, by sect. 1, gave certain powers. [His Lordship referred to the title and provisions of the Act, and continued:—] That Act was passed on the 27th of July, 1803. The first question is, what was the state of the law at that time as regards the testamentary powers of the different persons mentioned in the proviso at the end of the 1st section of the Act?

As regards infants, they had power of making wills of personal estate, in the case of males after the age of fourteen years, and in the case of females after the age of twelve years. As regards married women, the power of disposing by will of their separate estate was at that time well recognised; for in the year

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1789 the case of *Fettiplace* v. *Gorges* (1) was decided, of which I will not say that it established, but only that it clearly recognised the right of a married woman to dispose by will of her separate estate. The Lord Chancellor, Lord *Thurlow*, said (2): "I have always thought it settled, that from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it. . . . . Upon the cases I have always taken this ground; that personal property, the moment it can be enjoyed, must be enjoyed with all its incidents." So that in the year 1789, fourteen years before the Act 43 Geo. 3, c. 108, was passed, the right of a married woman to dispose by will of personal estate belonging to her for her separate use was clearly recognised. That being so, for reasons which the Legislature must have considered good and valid, certain classes of individuals, viz., "any person or persons being within age, or of non-sane memory, nor women covert without their husbands," were excepted from the operation of the Act, although at that time, as regards some of them, their right of disposition was well established; and consequently they remained subject to the fetters which were imposed by the *Statute of Mortmain*.

In the argument that was scarcely disputed, but reliance was placed upon the *Married Women's Property Act*, 1882, which, it was contended, has made a change in the law. The enactment which has been relied upon is sect. 1, sub-sect. 1. [His Lordship read it, and continued:—] If the contention on behalf of the vicar and churchwardens be well founded that enactment must have effected the repeal of the provisions of the *Statute of Mortmain*, so far as to enable married women *without their husbands* to make such gifts, grants, and alienations as are sanctioned by the Act of 43 Geo. 3, c. 108, notwithstanding that by the express terms of that Act married women without their husbands are excluded from the operation of it. That raises the question what is the state of the law with respect to the implied repeal —for there is in the Act of 1882 no express repeal—by the provisions of a statute dealing in general terms with a subject-matter with which the Legislature had previously dealt in a

(1) 1 Ves. 46. (2) 1 Ves. 48.

special and particular way. Now the rule, as I understand it, is this: that where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the Court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general Act to the prior and special legislation, or unless effect cannot be given to the provisions of the general Act without holding that there was such a repeal. There are numerous authorities on the point, amongst which I may refer to *Dr. Foster's Case* (1); *Lyn* v. *Wyn* (2); *Fitzgerald* v. *Champneys* (3). In the case last mentioned Vice-Chancellor Sir *W. Page Wood* gave the reason for the rule. He said (4): "The reason in all these cases is clear. In passing the special Act, the Legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and, having so done, they are not to be considered, by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated."

Now in the year 1803, the Legislature having before it the special subject of making gifts in favour of the erection of churches, saw fit to exclude married women without their husbands from the operation of the Act. In 1882 the *Married Women's Property Act* of that year was passed, dealing not with that subject at all, but with the general disabilities of married women to dispose of their property, and in that Act there is no mention of or reference to the prior legislation in respect of charitable gifts, and, as it seems to me, full effect can be given to the words of sub-sect. 1 of sect. 1, which I have read, by treating them merely as directed to the removal of the general disabilities of married women to acquire, hold, and dispose, by will or otherwise, of real or personal property. That being so, I do not think I can infer any intention on the part of the Legislature

(1) 11 Rep. 56 b.
(2) O. Bridg. 122, 127.
(3) 2 J. & H. 31.
(4) Ibid. 54.

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to remove the fetters which were not removed in the year 1803, and therefore I am of opinion that the *Married Women's Property Act*, 1882, does not make this gift valid.

Several cases were referred to on the construction of the *Married Women's Property Act*, 1882, but none of them are directly in point. It is right, however, that I should refer to one or two of them. The case of *Lowe* v. *Fox* (1) related to a totally different subject-matter. The action was for assault and false imprisonment brought by the plaintiff for her detention in a private asylum for lunatics, and one of the defences raised in the action was a plea of the *Statute of Limitations* (21 Jac. 1, c. 16, s. 7), but it was held that for the purposes of that statute a married woman has become "discovert" by reason of the provisions of the *Married Women's Property Act*, 1882, and that a married woman can, under sub-sect. 2 of sect. 1, maintain such an action if brought within the proper limit of time after the date when that Act came into operation. That case does not appear to me to deal in any way with sub-sect. 1 of sect. 1 of the Act, nor to contain any principle which binds me to decide otherwise than I have indicated in reference to the construction of the *Married Women's Property Act*, 1882. The case of *Riddell* v. *Errington* (2) was a decision by Mr. Justice *Pearson*. It related not to any matter of substantive law but to the practice under sect. 50 of the *Settled Estates Act*, 1877. After the passing of the *Married Women's Property Act*, 1882, a woman who was married subsequently to that Act presented a petition, and a question was raised whether, under sect. 50 of the Act of 1877, she ought not to be examined as to her consent, and the learned Judge held that it was not necessary. I am far from throwing any doubt on that decision, but it was a case decided *ex parte*, and the only argument was for the petitioner. No reasons were given for the decision, and it may very well be that the learned Judge, having regard on the one hand to the passing of the *Married Women's Property Act*, 1882, which enabled married women to sue without their husbands, and on the other hand, to the provisions of sect. 70 of the *Conveyancing and Law of Property Act*, 1881 (44 & 45 Vict. c. 41), which made the orders of the Court conclusive, notwithstanding the

(1) 15 Q. B. D. 667. (2) 26 Ch. D. 220.

want of "any concurrence, *consent*, notice, or service," came to the conclusion that it would be the merest pedantry to insist any longer on the observance of a practice which all knew was very troublesome and in nearly every case perfectly useless. There is nothing in that case which would lead me to come to a different conclusion in the present case. I will refer to one more case, that of *In re Price* (1), which shews that notwithstanding the wide words in sect. 1, sub-sect. 1, of the *Married Women's Property Act*, 1882, the wills of married women will not in all respects have the same effect as those of spinsters. There Mr. Justice *Pearson* considered that sub-sect. 1 gives a married woman power to dispose by will only of property of which she is seised or possessed while she is under coverture, and that her will made during coverture is not, notwithstanding sect. 24 of the *Wills Act* (1 Vict. c. 26), unless it be re-executed after she has become discovert, effectual to dispose of property which she acquires after the coverture has come to an end. It seems to me that the motion has failed, and that it must be refused with costs.

Solicitors: *Taylor, Hoare, Taylor, & Box*, agents for *Horton, Lee, & Lee, Birmingham; Letts Brothers*, agents for *J. H. Baker, Birmingham; Beale & Co.*, agents for *Beale, Marigold, Beale, & Groves, Birmingham.*

(1) 28 Ch. D. 709.

T. F. M.

STIRLING, J.

1887

April 21; *May* 26.

NANNEY *v.* MORGAN.

[1882 N. 565.]

Stock of Railway Company—Transfer by Trustees to Beneficial Owner—Companies Clauses Consolidation Act, 1845, *incorporation of, with Private Act—Regulations required by the Act for legally vesting Stock, not complied with.*

Stock of a railway company with whose Act the *Companies Clauses Consolidation Act*, 1845, was incorporated, stood registered in the names of two trustees who held in trust for *A.* In 1869, *A.* by a voluntary deed purported to assign the stock upon certain trusts; and this deed had been held to be operative on such of the property comprised in it as was at its date vested in *A.* in equity only, but not on any property then legally vested in him. It appeared that prior to the deed of 1869, the trustees of the stock had executed and sent to the secretary of the company a transfer to *A.*, defective in various particulars, including the stamp. The secretary returned it, and the defects were not made good till after the execution of the voluntary deed:—

Held, that at the date of the voluntary deed there had been no such delivery to the secretary of the transfer as required by sect. 15 of the *Companies Clauses Consolidation Act*, and that the legal title to the stock had not then passed to *A.*

Adjourned summons.

Howel Morgan, now deceased, previously to the year 1868 was entitled to a sum of £6505 consolidated ordinary stock of the *London and North Western Railway Company*. It was standing in the books of the company in the names of two trustees, *Richards* and *Griffith*. By an indenture of settlement, dated the 30th of November, 1869 (which was voluntary), and which was executed by *Howel Morgan*, he affected to settle the same sum of stock, together with other property, upon himself and his wife during their joint lives, then upon his wife for life, and then he gave his wife a power of appointment over the property comprised in the indenture. Mrs. *Morgan*, who predeceased her husband, in exercise of the power conferred upon her, made an appointment in favour of two of her nieces. *Howel Morgan* died in October, 1884, after the commencement of this action, which was brought by one of the trustees for the administration of the trusts of the settlement. The action came on to be heard before Mr. Justice *Kay* in

March, 1884, when his Lordship on the 12th of that month, in giving judgment, declared "that such of the shares, moneys, stocks, funds, and securities specified in the schedule to the said indenture of the 30th of November, 1869, as at the date thereof, not only belonged to the Defendant *Howel Morgan* in equity, but were legally vested in him, did not pass by the assignment in such indenture contained to the Plaintiff, and the Defendant *William Griffith* (the trustees), but that such of the aforesaid shares, moneys, stocks, funds, and securities as were not then legally vested in the Defendant, *Howel Morgan*, although belonging to him in equity, did pass by the said assignment," and an inquiry was directed "of what particulars such last-mentioned shares, moneys, stocks, funds, and securities consisted at the date of the said indenture and now consist, and in whom the same are vested."

The Chief Clerk by his certificate, dated the 10th of November, 1886, made in pursuance of the direction, found that the shares, moneys, stocks, funds, and securities which were not at the date of the indenture of the 30th of November, 1869, in the judgment mentioned legally vested in the Defendant, *Howel Morgan*, although belonging to him in equity, consisted of the particulars set forth in the schedule thereto, including the item No. 2 if the Court should be of opinion, having regard to the circumstances thereinafter stated, that the same was not legally vested as aforesaid, but if otherwise then excluding such item No. 2. He then proceeded to state the circumstances as follows:—"On the 22nd of July, 1868, expressed to be for a nominal consideration, a transfer a sum of £6505 *London and North Western Railway* stock mentioned in the said item No. 2 in the schedule thereto from *Richard Meredith Richards* (now deceased), and *William Griffith*, to the Defendant *Howel Morgan*, was duly executed by all such parties. In the beginning of August, 1868, such transfer was sent by the said *William Griffith* to the said railway company for registration. It was not sufficiently stamped, nor was it properly dated, the year being omitted from the date, and the stock certificate or coupon was not forwarded by the company together with the transfer, as required by the note at the foot of each such certificate, nor was the registration fee paid." The letter of the secretary of the

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company returning the transfer was produced in Court, and it was stated to be in entire accordance with what was set forth by the Chief Clerk. The certificate went on to state that "In consequence of these omissions and in order that they might be supplied, the company on the 7th of August, 1868, returned the transfer to the said Defendant, *William Griffith*, who caused the same to be impressed with a further stamp duty on the 11th of August, 1868. No further step with reference to the registration of the transfer took place until the 29th of February, 1872, when the said *William Griffith* attended at the office of the company, and left the transfer duly stamped, and dated the 22nd of July, 1868, together with the letter of the 29th of February, 1872, mentioned or referred to in the affidavit of *Stephen Reay*, but without the stock certificate or coupon, the production of which the company then required." The letter referred to was as follows:—"I send in transfer of £6505 herein dated the 22nd of July, 1868; the delay in sending it in at the time was a suggestion of an alteration by adding £666 10*s.* to the transfer, and before it was done Mr. *Richards*, my co-trustee, went abroad. The circumstances remain the same at this time as they were at the time of its execution." Signed, "*William Griffith.*" "On the 29th of February, 1872, the said *Howel Morgan* was recorded in the books of the said company as the holder of the said stock, but in consequence of the stock certificate in the names of the transferors not having been produced as aforesaid, no certificate or stock coupon for such stock was ever issued to the said *Howel Morgan*, and the company's certificate of registration was never completed. The company's registrar of transfers by a memorandum, dated the 18th of July, 1872, informed the said *William Griffith* that the registration of the transfer could not be completed until the said stock certificate or coupon in the name of the transferors was furnished, and the said *William Griffith* replied by letter, dated the 26th of July, 1872, that such certificate or coupon could not be found. From the 22nd of July, 1868, to the 29th of February, 1872, the said stock stood registered in the names of the said *Richard Meredith Richards* (now deceased), and *William Griffith*, and the dividend warrants in respect thereof were sent and made payable by the company to the wife of the

said *Howel Morgan* pursuant to a letter of authority from the said *William Griffith* to the company dated in 1863. After the 29th of February, 1872, such dividend warrants were sent and made payable to the said late Defendant *Howel Morgan* until his death. The certificates for the said £6505 stock, all of which are dated the 26th of September, 1860, and are in the names of *Richard Meredith Richards* and *William Griffith*, were in the possession or custody of the said *William Griffith* from 1860 until after the commencement of this action, when the same were deposited, by arrangement, by the solicitors for the Plaintiff and the Defendant *William Griffith* in their joint names at the *Bloomsbury* branch of the *London and Westminster Bank* for safe custody."

This was an adjourned summons taken out by the Plaintiff asking, in effect, that it might be determined whether the sum of £6505 stock was or was not at the date of the indenture of the 30th of November, 1869, legally vested in *Howel Morgan*, and that such directions, as to the Judge might seem fit, might be given with reference to a transfer to or vesting in the Plaintiff, and the Defendant *William Griffith*, or otherwise, of the said sum of stock subject to the trusts of the said indenture; and that the costs might be provided for.

Pearson, Q.C., and *Upjohn*, for the Defendant *John Morgan*, the legal personal representative of *Howel Morgan*:—

Under the *Companies Clauses Consolidation Act*, 1845, a transfer passes the title as from its date, although the proper stamp is not then affixed, and neither sect. 15 nor any other section makes registration or delivery to the secretary a condition precedent to the passing of the title by transfer. See sects. 6, 8, 14, 15, 16, 17, 20, and 62: *Steel's Case* (1); *Wolverhampton New Waterworks Company* v. *Hawksford* (2); *Portal* v. *Emmens* (3). The words in sect. 8 "and whose name is entered on the register," are descriptive merely, and do not make registration a condition precedent. Sect. 9, which requires the company to keep a register, must, no doubt, be substantially complied with in order to make the

(1) 28 W. R. 241. (2) 7 C. B. (N.S.) 795, 814.
(3) 1 C. P. D. 201, 664.

STIRLING, J. register evidence under sect. 28: *East Gloucestershire Railway Company* v. *Bartholomew* (1).

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It is submitted that the deed of transfer was sufficiently stamped and executed, and that the company could have been compelled by mandamus to register. The cases already cited shew that as to sect. 8 entry upon the register is not essential to being a shareholder. The words are merely descriptive.

Delivery of the transfer for registration is no part of the title. The sects. 15, 16 and 17 were considered in the case of *The Queen* v. *Wing* (2), and differences in the language were pointed out.

[*Société Générale de Paris* v. *Walker* (3) and *Colonial Bank* v. *Whinney* (4) were also cited.]

Hastings, Q.C., and *B. Eyre*, for the two appointees:—

This case is not governed by the 8th section at all. We do not rely upon the earlier sections, but upon the 14th and following; and what the Court has to consider is whether the transfer had been stamped and executed, and everything else had been done as required by the regulations. What are the regulations, and were they complied with? If they were not, there was no transfer duly made to entitle the Defendant *Morgan* to say that the stock was duly vested in his testator. There was not a proper delivery, for it was not in a form in which the company was bound to recognise it for registration. The judgment in the case of *Société Générale de Paris* v. *Walker* is important, as it shews what are the rights of voting, attending meetings of the company, and executing transfers, and at the date of the indenture, the 30th of November, 1869, the trustees had certain rights, and not *Howel Morgan*. He never put himself in a position to have the transfer registered. Sects. 18 and 19 of the Act of 1845 should be looked at, and sect. 20 distinctly shews that the person in whose name the stock stands is the legal owner. The whole of these sections clearly shew what is requisite to be done to effect a complete transfer, and that is supported by the judgments in *Colonial Bank* v. *Whinney*, and the conclusion is that the

(1) Law Rep. 3 Ex. 15.
(2) 17 Q. B. 645.
(3) 11 App. Cas. 20.
(4) Ibid. 426.

stock was not, upon the 30th of November, 1869, legally vested in *Howel Morgan* but in the two trustees for him.

Ingle Joyce, for the Plaintiff, and *R. F. Norton*, for the Defendant *William Griffith*, the two trustees.

Pearson, in reply.

STIRLING, J. (after stating the judgment of the 12th of March, 1884, and the facts set forth in the Chief Clerk's certificate, continued):—

The question which under these circumstances I have to determine is whether, on the 30th of November, 1869, the stock in question was or was not legally vested in *Howel Morgan*. The Act of Parliament under which the stock was created incorporated the *Companies Clauses Consolidation Act*, 1845. Clause 62 refers to the transfer of stock. [His Lordship read the clause, and continued:—] That sends us back to the 14th and following clauses, which are headed "And with respect to the transfer or transmission of shares be it enacted as follows:" [His Lordship read the 14th, 15th, 16th and 17th sections, and continued:—] It is upon the true construction of those sections that the answer to the question for decision appears to me to depend. First, what is the meaning of the words in sect. 14, "subject to the regulations herein or in the special Act contained?" It was contended that those words are satisfied by the provisions contained in that section and in sects. 16 and 17, and that they do not embrace the provisions which are to be found in sect. 15, but I am not able to place that construction upon the Act, for it appears to me that the enactments contained in sect. 15 are just as much "regulations" as those contained in sects. 14 and 16. That being so, it is, in my judgment, essential to the legal efficacy of a transfer that it should be delivered to the secretary of the company to be kept by him in accordance with sect. 15; and that appears to have been established by the decision in the case of *Copeland* v. *North Eastern Railway Company* (1). In that case the action was for a mandamus commanding the defendants to enter and

(1) 6 E. & B. 277.

STIRLING, J. 1887 NANNEY v. MORGAN.

register in the register of shareholders of the defendants according to the statute (which was the *Companies Clauses Consolidation Act*) the name of the plaintiff as the person entitled to, and the holder and proprietor of, the shares in the *North Eastern Railway Company* under a deed of transfer. The deed in question comprised considerable landed estate and shares in many other companies as well as shares in the *North Eastern Railway Company*, and no doubt it has since been decided that a deed in that form does not comply with the requirements of sect. 14; but that is not the point which appears to me to have been raised and decided in that action. The averment in the plea of the company was that the plaintiff did not at any time before the commencement of the suit deliver the deed or any other transfer of the said shares to the plaintiff to the secretary of the defendants, to be kept by him, though requested so to do, and that they were always willing to register on such transfer being delivered to their secretary, to be kept by him. Lord *Campbell*, in giving judgment, said (1):—"The question for our decision was, Whether the plaintiff was entitled to have his name entered on the register as a shareholder as a person 'entitled under such transmission' referred to in the 18th section of the *Companies Clauses Consolidation Act*, the company insisting that the present case fell within the 14th and 15th sections of the Act of Parliament, and requiring that a deed of transfer should be left with their secretary, to be kept under the provisions of the 15th section." Then his Lordship said: "We are of opinion that the company are right in the view they have taken of this transaction," and he concluded, after examining the sections of the Act, in these words: "We are satisfied that the Legislature intended that every transfer should be by deed to be left with the company, which the new taker was to execute, to testify conclusively his acceptance of the shares and his taking upon himself the liabilities of a shareholder."

Some reliance was placed upon sect. 17, which was said to shew that a transfer might immediately on execution be effectual as between the transferor and transferee, though not as between either of them and the company. It does not appear to me that that is the correct view of the section. I think that sect. 17

(1) 6 E. & B. 283, 284.

merely provides that a transfer executed while the transfer books are closed shall (if and when duly delivered to the company in accordance with the Act) be considered as made subsequent to the ordinary general meeting as between the company and the party claiming under the transfer, though as between the parties it may (if and when so delivered) take effect from an earlier date. It does not, however, as I think, recognise that even as between the transferor and transferee a transfer is effectual to pass the legal title (whatever its effect may be otherwise) unless and until it be delivered in accordance with sect. 15.

This view appears to me to derive support from what was laid down in the case of *Société Générale de Paris* v. *Walker* (1). In that case the governing Act was not, as here, the *Companies Clauses Consolidation Act*, 1845, but the *Companies Act*, 1862 (25 & 26 Vict. c. 89), sect. 22 of which provides that the shares in a company under that Act shall be capable of being transferred in manner provided by the regulations of the company. The particular regulations provided that the shares should be transferable only by deed executed by the transferor and transferee, and duly entered in the register of transfers; and in that case the Earl of *Selborne* (2), after discussing the matter and speaking of a transfer which he thought was not in that case proved to have been completely executed, said: "It could not, under the 26th article of association of the tramways company confer (while unregistered) a legal title to the shares themselves." Under the *Companies Clauses Consolidation Act*, 1845, delivery to the company is, as I think, just as essential to the legal efficacy of a transfer as in the case before the House of Lords registration was under the regulations to which Lord *Selborne* referred. In that case his Lordship laid down that under those regulations an unregistered transfer was incapable of conferring a legal title to the shares, and where the regulations contained in the *Companies Clauses Consolidation Act*, 1845, prevail, I am of opinion that a transfer not delivered to the company is equally inefficacious.

In the present case, the transfer was originally sent to the company in August, 1868, but it was returned to the transferor, or rather to one of the transferors, by the secretary, mainly

(1) 11 App. Cas. 20. (2) 11 App. Cas. 28.

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because it was improperly stamped, but also because the year of execution was not inserted, and because it was not accompanied by the coupons representing the stock and registration fee. Sect. 14 provides that the deed of transfer shall be duly stamped, and as the requirements of the section in that respect were not complied with, the secretary, in my opinion, was clearly entitled to return the transfer. Such return, whether right or wrong in the first instance, was acquiesced in by the transferor, who, on the 11th of August, 1868, caused the proper stamp to be affixed. He appears, however, to have retained the transfer in his possession until the 29th of February, 1872, when it was again delivered by him to the secretary; the reason given by the transferor for the delay being that it had been in contemplation to alter the transfer by adding to the amount of the stock transferred. Even then, the coupons were not sent to the company. It appears to me that until the 29th of February, 1872, at the earliest, the transfer was not delivered to the company within the meaning of sect. 15, and was not effectual to vest legally in *Howel Morgan*, the transferee, the stock purported to be thereby transferred. It follows that the question whether the stock was, at the date of the indenture of the 30th of November, 1869, legally vested in *Howel Morgan* (and this, regard being had to the form of the judgment in the action, is the only point which I have to consider) must be answered in the negative.

Solicitors: *Gregory, Rowcliffes & Co.*, agents for *Jones & Jones, Portmadoc; Clarke, Woodcock & Ryland*, agents for *William Griffith & Son, Dolgelly; Morgan, Son, & Upjohn; Crouch, Spencer & Edwards.*

T. F. M.

TOPHAM *v.* BOOTH.

KEKEWICH, J.

[1886 T. 893.]

1887

May 11, 12.

Mortgagor and Mortgagee the same—Statute of Limitations—Payment—Trustees.

S. was, under a will, entitled for her life to the interest on a sum of money which had been invested by the trustees of the will on mortgage of land. The mortgagor had afterwards conveyed the land (subject to the mortgage) to trustees on trust for *S.* for her life. During her life she received and retained the rents for more than twenty years:—

Held, that though no interest had been actually paid, yet as the person who was entitled to the rents was also entitled to the interest, the rights of the trustee of the mortgage were not barred by 3 & 4 Will. 4, c. 27, s. 40, and that the fact of the rents being payable to one set of trustees and the interest being payable to another set of trustees did not alter the case where the *cestui que trust* was in each case the same.

Burrell v. *Earl of Egremont* (1) followed and explained.

HENRY BROWN, who died in 1834, by his will devised and bequeathed all his real and personal estate to *J. Davison*, *John Topham*, and *A. Lace* upon trust, to invest the same as therein mentioned, and to pay the annual income to his widow *Mary Brown* (afterwards *Mary Sharp*) during her life or widowhood, but in case she should marry again then to pay her thereout an annuity of £300 during her life; and subject thereto for the children of *Elizabeth Logan*.

The widow of *Henry Brown* some time before the year 1838 was married to *William Sharp*.

By indentures of lease and release dated the 4th and 5th of March, 1838, certain lands at *Tranmere* were conveyed by *William Sharp* to *John Topham* by way of mortgage to secure the repayment of £735 advanced out of *Henry Brown's* estate, and interest; and under a deed of further charge other sums were advanced by *John Topham* to *William Sharp* on this security, amounting altogether to £4350, which appeared to be the whole of the residuary estate of *Henry Brown*.

By an indenture dated the 6th of June, 1838, and an indenture

(1) 7 Beav. 205.

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of settlement dated the 7th of June, 1838, *William Sharp* conveyed the lands comprised in the above-mentioned mortgage to *James Dixon* and *B. Haram* (subject to the mortgage and further charge) upon the trusts therein declared, under which *Mary Sharp* was equitable tenant for life of the mortgaged lands.

Part of the lands comprised in the mortgage of the 5th of March, 1838, had been released, and sums had been received on account of the mortgage which reduced the sum due to about £3000. The mortgage had been transferred to *Johanna Topham* as trustee for the persons claiming under the will of *Henry Brown*. There had also been other dealings with the property which do not require notice in this report.

William Sharp died in 1856, and *Mary Sharp* had ever since received the rents and had kept them, the interest on the mortgage not being enough to pay her the £300 a year to which she was entitled. *Mary Sharp* died in 1885.

Johanna Topham and *C. B. Logan*, who was one of the persons interested under the will of *Henry Brown*, brought this action against the Defendants *G. H. Booth* and *H. Golborne* (who were the present trustees of the settlement made by *William Sharp* in 1838), claiming an injunction to restrain them from interfering with the remaining lands comprised in the mortgage of 1838, and claiming sale or foreclosure.

The Defendants pleaded, amongst other things, the *Statute of Limitations*.

Warmington, Q.C., and *Cochran*, for the Plaintiffs:—

The Defendants rely on the *Statute of Limitations*, 3 & 4 Will. 4, c. 27, s. 40, and no doubt it is true that no interest has been actually paid and received; but that was because Mrs. *Sharp* was as tenant for life entitled to the rents, subject to the mortgage, and was also an annuitant entitled to the interest, and therefore, as in *Burrell* v. *Earl of Egremont* (1), the statute does not apply. It could not be necessary to go through the form of paying the money and then having it back. So in *Wynne* v. *Styan* (2); *Lord Carbery* v. *Preston* (3); *Baldwin* v. *Baldwin* (4).

(1) 7 Beav. 205.
(2) 2 Ph. 303.
(3) 13 Ir. Eq. Rep. 455.
(4) 4 Ir. Ch. Rep. 501.

Barber, Q.C., and *V. R. Smith*, for the Defendants:—

Mrs. *Sharp* was in possession for nearly thirty years, during all which time no interest was ever paid. In *Burrell* v. *Earl of Egremont* (1) the persons were the same. The principle of that case only applies where there is no one to pay and no one to receive. Here the trustees of the settlement had to pay, and the trustees of the will had to receive. If they have neglected their duty they may be liable, but that does not affect the mortgagor. The legal estate was in them, there was an assignable person to pay, and they ought to have seen that it was done: *Harlock* v. *Ashberry* (2). *Newbould* v. *Smith* (3) shews that a payment without authority will not avoid the statute, and there is no pretence that the trustees authorized payment of rents or interest.

KEKEWICH, J.:—

The Plaintiffs in this case claim as mortgagees—that is to say, the first Plaintiff as legal mortgagee and the other as beneficially interested. They claim under a mortgage created on the 5th of March, 1838, by one *William Sharp*. As a matter of fact there was a further charge, and then some part of the property included in the mortgage and further charge was released, and then that released property was again mortgaged, and that second mortgage was transferred to a person under whom the Plaintiffs claim. Not forgetting these things I may say, with sufficient accuracy, that the Plaintiffs claim under a mortgage of the 5th of March, 1838.

The first objection on behalf of the Defendants, who claim the equity of redemption—is that that mortgage of 1838 is absolutely gone. [His Lordship then referred to certain transactions which took place in the year 1856, coming to the conclusion that they had not that effect.]

That being so, a serious question arises whether the right of the mortgagee is not barred by the operation of the *Statute of Limitations*. It is common ground that no interest was paid on the mortgage debt for upwards of twenty years, which would bring it within the period limited by the statute 3 & 4 Will. 4, c. 27, s. 40, that is to say, no interest was paid in this sense, that

(1) 7 Beav. 205. (2) 19 Ch. D. 539.
(3) 29 Ch. D. 882.

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nobody ever handed over so many sovereigns or notes, or even a cheque, and nobody gave a receipt for the interest. If the case could be rested there, the statute would apply, and the right of the mortgagee would be barred. But the circumstances are peculiar.

This mortgage was granted to secure, and as representing a fund for payment of an annuity to which Mrs. *Mary Sharp* was entitled under the will of *Henry Brown*. She was, therefore, entitled to the interest on this mortgage debt, and whoever might have received the interest, whether it was the trustee of *Henry Brown's* will or any one else, would have been bound to pay it over to her; and, so long as there was no improper dealing she might have given the mortgagor a receipt for the interest from time to time, and her trustee could not have claimed it as against the mortgagor if the mortgagor had paid it to her. Then Mrs. *Sharp* became entitled to the mortgaged property in this way. In 1838, which I take to be the only date necessary to bear in mind, because the 1856 settlement depends on transactions which I now disregard, *William Sharp*, the mortgagor, conveyed the equity of redemption in this property to trustees in trust for sale with the consent of himself and wife, and the proceeds of sale and the rents and profits until sale were directed to be held in trust during the joint lives of *William Sharp* and *Mary* his wife to pay to *Mary Sharp* for her separate use, and after the death of either of them, if *Mary Sharp* was the survivor, as was the case, to her for life, and if he was the survivor to him for life. Therefore, during their joint lives she was tenant for her separate use, and, after the death of her husband she, as the survivor, was tenant for life. The result was that if the interest on the mortgage debt had been paid by the mortgagor to any person entitled to receive it that person must have accounted for it in some way or other to Mrs. *Sharp*. But then it is argued that she was not really the person liable to pay the interest, that the trustees of the settlement were the persons liable to pay the interest, and that though she was entitled to the rents and profits, yet she was not liable to pay the interest on the mortgage debt; and there was not that coalition of the two interests which would exclude the operation of the *Statute of Limitations*.

In order to meet this argument I must consider the principle laid down in the case of *Burrell* v. *Earl of Egremont* (1), adopted in many other cases, and recognised in all the cases on the statute which have at all touched on the same point. I said during the argument, and I repeat, that as a rule nothing can be more unsafe or more unfair to a Judge than to take a passage from a judgment and to construe it without reference to the facts of the case. But that, though a general rule, must not be pushed too far. Many Judges lay down principles—the late Master of the Rolls frequently did so—to guide the Court before applying them to the facts of the case; and this is frequently a convenient method of proceeding. I consider that in his long and carefully considered judgment Lord *Langdale* did lay down a principle applicable to a case of this kind quite independently of the case before him, though he applied it to that case. I understand the principle which he lays down to be this: that in order to apply the *Statute of Limitations* to a particular case you must find a person liable to pay and a person liable to receive the interest, *i.e.*, two different persons, and that when he speaks of an assignable person, to use his own expression, or the person entitled to the interest, he does not necessarily mean the person legally entitled to claim it from the tenants by virtue of the ownership of the legal estate. In the same way he does not refer to the person who is bound to pay as the legal owner of the estate charged, but he means that when the interest beneficially belongs to the same person who would suffer if the interest were paid, that is to say, from whose income the payment would be a deduction, the statute cannot apply. That is how I read his language, particularly the passage at p. 235, where he uses these words:—"Where the rent, out of which the interest of the charge ought to be paid, is receivable by and belongs to the same person who is entitled to the interest."

In this case Mrs. *Sharp* was entitled to receive the rents and profits. She was also entitled to receive the interest on the mortgage debt. If it had been paid to her trustees they must have paid it over to her. On the other hand, if the interest on

(1) 7 Beav. 205.

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the mortgage debt had been paid by the trustees, it would have been a deduction from her life interest, taken out of the rents and profits, and she would have had so much less.

I put to Mr. *Vernon Smith* the case which occurred to me as a fair test. Suppose Mrs. *Sharp* had said to her trustees, "I care not what your legal rights are, whether you are bound to pay or whether the mortgagor ought to have a receipt for the interest or not. I tell you I am in possession of the property out of which the mortgage interest must come, and I say it shall not be applied in that way." I cannot see that the trustees would have had any answer to such a direction on her part.

It has been said that the case is not within the statute, or that the circumstances do not take it out of the statute. I do not think those expressions are accurate. The statute provides that unless during a certain period the interest has been paid by the person by whom the same shall be payable, or his agent, or some acknowledgment has been given, the statute shall run. You are not bound to shew a receipt in writing or an account. If the circumstances are such that the Court may fairly presume that payment was made, then the Court will presume payment, notwithstanding that no such payment is proved, and notwithstanding that, as a matter of fact, no cash passed and no cheque was drawn, and nothing was done in the way of formal payment. I think that in this case the Court ought to presume that Mrs. *Sharp* did that which any reasonable person would have done, and said, "I being entitled to receive, I being in fact for all intents and purposes liable to pay, I will not have time and trouble and expense wasted in passing money or documents from hand to hand; I shall remain in possession, I shall take the rents and profits, and the result is, I shall not get the interest on the mortgage debt *quâ* interest, but I shall get it *quâ* rents and profits." That seems to be the fair conclusion from the circumstances. It is I think supported by *Burrell* v. *Earl of Egremont* (1) and not controverted by any other case cited or any principle on which the Court administers justice between parties.

Therefore, I think the Plaintiffs are entitled to stand as

(1) 7 Beav. 205.

mortgagees under the deed of 1838, and they must have the ordinary mortgage account on that footing.

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Solicitors for Plaintiffs: *Sharpe, Parkers, & Co.*, agents for *Laces & Co., Liverpool.*

Solicitors for Defendants: *Bell, Brodrick, & Gray*, agents for *J. B. Culshaw & Co., Liverpool.*

C. M.

C. A.
1887
NORTH, J.
Feb. 25, 28.
C. A.
March 30.

MUTRIE *v.* BINNEY.

[1886 M. 2880.]

Practice—Concurrent Actions—Action in Colony and in England—Counter-claim.

B., of *London*, and *M. & C.*, of *Honduras*, carried on business in partnership at *Honduras* as *G. & Co.* *B. & N.* carried on business in partnership in *London* under the same name. The *Honduras* firm employed the *London* firm as their agents under an agreement by which *B.*'s share in the profits of the *Honduras* firm was to be brought into account as between the two firms to the credit of the English firm. The *Honduras* partnership was dissolved, and *B.* obtained a decree in *Honduras* for taking the partnership accounts. Before those accounts had been fully taken, *M. & C.* brought this action in *England* against the *London* firm for an account of the dealings between the two firms, alleging the Defendants to have made improper profits in their agency. The Defendants denied having made improper profits, and by counter-claim claimed to have the accounts of the *Honduras* firm taken. *North*, J., ordered the counter-claim to be struck out:—

Held, by the Court of Appeal, that though if *M. & C.* had not brought this action, *B.* would not, after obtaining a decree in *Honduras*, have been allowed to carry on another action here for the same purpose, still as the two actions were so closely connected that neither of them could be finally wound up independently of the other, *B.* ought not to be prevented from proceeding with his counter-claim so as to be in a position to ask at the trial of this action for such a decree as might be right, having regard to the then position of the *Honduras* action; and that on *N.*'s undertaking to be bound by the proceedings in the *Honduras* action, the order of *North*, J., must be discharged.

THE Plaintiffs in this action were two persons named *Mutrie & Currie*, resident in *British Honduras*. The Defendants were *Binney & Niven*, the two partners in a *London* business carried on under the name of *William Guild & Co.* of *London*. They were both resident in *England*. The Plaintiffs and the Defendant *Binney* had carried on business at *Belize*, *British Honduras*, under the name of *William Guild & Co.* of *Belize*, under articles of partnership which came to an end on the 31st of January, 1884.

William Guild & Co. of *London* were the agents of *William Guild & Co.* of *Belize*. By the terms of agency the *London* firm agreed to act as general agents for *W. Guild & Co.* of *Belize*, on

the terms of a certain memorandum which provided, *inter alia*, that they should "keep two accounts in their books, the one being a general account shewing at debit the amount due to them from year to year, including *William Binney's* share of profits, and bearing interest at the rate of £5 per cent." The effect of this was that *Binney's* share of profits in the *Honduras* business was to be brought into account in the books of the *London* firm to the debit of the *Honduras* firm.

In April, 1885, *Binney* commenced an action in the Supreme Court of *British Honduras* against *Mutrie & Currie*, for an account of the *Belize* partnership transactions and payment of what should be found due from either of the parties to the other.

On the 28th of April, 1885, an order was made for taking the partnership accounts. On the 1st of June, 1885, an order on further consideration was made directing how the surplus assets were to be divided.

The writ in the present action was issued on the 15th of September, 1886. The statement of claim alleged that the Defendants had made secret and illegitimate profits in the course of their agency, and retained sums for which they ought to have accounted. The Plaintiffs claimed an account of all moneys received and paid by the Defendants as agents of the *Belize* firm; an inquiry how much of the amount found due from the Defendants on such account belonged to the Plaintiffs respectively, and payment to the Plaintiffs respectively of the amount due to them; an account of the share of *Binney* in all profits made by the *London* firm in respect of business done by them as agents of the *Belize* firm other than profits which they were entitled to make under the terms of their agency, except so far as such profits were included in the account first asked for; an inquiry how much of the amount found due from the Defendant *Binney* on the last-mentioned account belonged to the Plaintiffs respectively, and payment to the Plaintiffs respectively of the amount due to them.

The Defendants put in a defence and counter-claim. The statement of defence alleged that in the *Belize* suit it was admitted that all liabilities of the *Belize* firm had been discharged or provided for except a liability to *Binney* for rent, and further alleged that by an order of the Privy Council, dated the 11th of

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December, 1886 (1), discharging the order of the 1st of June, 1885, the principles upon which the surplus assets in the hands of the partners should be distributed amongst the partners had been declared. It denied that the Defendants had made any profits or received any sums of money for which they ought to have accounted but had not accounted to the Plaintiffs.

The counter-claim alleged that *Niven* was interested in taking the accounts of the *Belize* firm, because the agency account was under agreement between the two firms credited with *Binney's* share of the partnership profits, and that

"In the said partnership suit certain accountants appointed by order of the Supreme Court of *Honduras* reported to the Court in the month of May, 1885, the results of their examination of the partnership books, shewing therein the balance sheets of the firm on the 1st of February, 1879, when the Plaintiff *Currie* was first admitted as a partner, and on the 31st day of January, 1884, when the partnership expired, also the account of each partner with the firm from the 1st of February, 1879, to the 31st of January, 1884. The accountants added other reports directed to shew the amounts of the surplus assets of the firm in the hands of the several partners, which included a statement of the accounts current of Messrs. *Guild & Co., London,* with the *Belize* firm as at date the 13th of May, 1885, being the account to which the Plaintiffs' claim relates.

"Except that the principle upon which the said surplus assets should be distributed, has been ascertained, and certain accounts and inquiries directed by the said Order of Her Majesty in Council, with a view to such distribution, nothing has been done in the said suit. No progress has been made in taking the said accounts or in prosecuting the said inquiries. In July, 1885, the Defendant *Binney* delivered a surcharge relating to eight items as reported in the statements of the accountants. The Plaintiffs made no objection to such reports. The Chief Justice, of his own motion, referred some of those surcharges to be tried by a jury, and postponed the consideration of the remainder. His successor was, prior to his appointment, engaged as counsel and solicitor in the suit, and is the only Judge in the colony. The

(1) 12 App. Cas. 160.

Clerk of Courts, by whom the accounts and inquiries directed by the said Order of Her Majesty in Council would have to be taken and made, was also formerly engaged as solicitor in the said suit. There is no machinery provided for the payment of money into the Colonial Court. It is impracticable to appoint in the colony a suitable person as receiver of the partnership assets and to get in the partnership outstandings."

It also alleged that the Plaintiffs had large sums in their hands in excess of their shares, that they were trading in *British Honduras* with such partnership assets, and the same were in danger of being lost. The Defendants counter-claimed an account of the *Belize* partnership dealings and consequential relief, and a receiver and injunction.

The Plaintiffs moved that the counter-claim might be struck out "as disclosing no reasonable cause of action, or as being vexatious, or as being unnecessary, or tending to prejudice, embarrass, or delay the fair trial of the action." The motion was heard before Mr. Justice *North* on the 25th of February, 1887.

Cozens-Hardy, Q.C., and *J. Cutler*, for the Plaintiffs :—

The counter-claim seeks the same relief as the action in *Honduras* does. *Binney*, the Plaintiff in that action, chose to sue in that Court, the rights of the parties have been determined there. The action has therefore proceeded so far that it would be oppressive to bring a fresh action for the same purpose in this country. No further relief could be obtained in this country. The Court here has no better power to provide a fit person to be receiver than the Court there has. No allegation as to the incapacity or partiality of the Court in *Honduras* can be attended to. The counter-claim therefore must be struck out as being vexatious: *Henderson* v. *Henderson* (1); *McHenry* v. *Lewis* (2); *Peruvian Guano Company* v. *Bockwoldt* (3); *Hyman* v. *Helm* (4); *The Christiansborg* (5).

Niven has no interest in the *Honduras* partnership. Therefore the counter-claim brought by the English firm is unfounded.

(1) 3 Hare, 100.
(2) 22 Ch. D. 397.
(3) 23 Ch. D. 225.
(4) 24 Ch. D. 531.
(5) 10 P. D. 141.

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This is not a mere question of parties, for it would be legally inconvenient to mix up the partnership action between the three persons with the agency action between the four.

Cookson, Q.C., and *Cowell*, for the Defendants :—

This is not a case in which *res judicata* could have been pleaded. There has been no such decree of the Court of *British Honduras* as to be conclusive, or to prevent the Plaintiff there suing in another country when the opportunity arrives, especially if he can get better relief by so doing. The Plaintiffs in this country at the utmost can put *Binney* to an election as to which *forum* he will proceed in. In addition to the cases already cited, we rely on *Bayley* v. *Edwards* (1) ; *Cox* v. *Mitchell* (2) ; *Ostell* v. *Lepage* (3) ; *Mitford* on Pleading (4).

The statement in the counter-claim must be taken for the purpose of this motion as true, and there is sufficient on that pleading to shew that more perfect relief can be obtained in this country than in *British Honduras*.

If *Niven* is an improper party to the counter-claim the defect can be cured by amendment.

Cozens-Hardy, in reply.

1887. Feb. 28. NORTH, J. :—

The Plaintiffs ask that the counter-claim may be struck out. The matter has been elaborately argued and several cases have been cited which it is necessary that I should refer to. The defendants say that they have a right to have a partnership action here for the purpose of taking the partnership accounts, notwithstanding that proceedings have been taken abroad. The Plaintiffs' case is that the Defendant *Binney* has selected his *forum*, and has got a decree, and the Defendants cannot come here to ask over again what one of them has got at his own suit in a decree in *British Honduras*. The partnership was a partnership there, and that was the place where the proceedings must

(1) 3 Swans. 703.
(2) 7 C. B. (N.S.) 55.
(3) 5 De G. & Sm. 95 ; 2 D. M. & G. 892.
(4) 5th Ed. 280.

be carried on, and the Defendants acted as their agents in *England* to give effect to the partnership dealings.

The first case referred to (and I refer to them in order of date rather than in the order in which they were cited) was *Bayley* v. *Edwards* (1). In that case *Bayley* had got a decree for an account against *Edwards*, and that decree was dated in 1784. That was not prosecuted at all. Nothing was done. Therefore *Edwards*, who was the defendant in the action in *England*, commenced an action of his own in *Jamaica* for the purpose of having the same accounts taken as were asked for by *Bayley* in his action in *England*. Then *Bayley* pleaded the *lis pendens* in *England* as a bar to the proceedings in *Jamaica*. The plea was overruled, and there was an appeal to the Privy Council. It is obvious that such a plea could not succeed on its merits, because it would be contrary to justice to say that if one person had got a decree in one country which he had not chosen to prosecute, such decree, notwithstanding its non-prosecution, should be a bar to the defendant here taking proceedings of his own in the country where the property was which was sought to be administered. There was a remark made there on which the defendants relied. It was this. Lord *Camden* said, in giving the judgment of the Privy Council (2): "If the first suit had been instituted in *Jamaica*, would the Court of Chancery here" (that means, would the Court of Chancery in *England*) "have allowed such a plea? Certainly not: *à fortiori*, the Court in *Jamaica*, which is the more apt jurisdiction, could not be expected to allow it." That obviously means this: supposing that a decree had been got in *Jamaica* which had never been prosecuted at all, and afterwards the defendant in *Jamaica* commenced proceedings here, could the defendant here have pleaded his non-prosecuted decree in *Jamaica* as a bar? Of course he could not. These further remarks are made by Lord *Camden*, which I think important. He says: "As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under the separate jurisdictions; I think the parties ought to be amenable to every Court possible, where they are travelling from country to country, and we must then endeavour to correct the

(1) 3 Swans. 703. (2) 3 Swans. 711.

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mischief of these double suits as much as we can, by allowing in each country the benefit of all the other proceedings in the other part of the king's dominions; and this should be introduced by supplemental bill, or insisted upon by answer, according as the occasion may require."

The next case was *Henderson* v. *Henderson* (1). I do not think that has very much to do with the present case. That was a case in which judgments had been obtained in *Newfoundland* against the English plaintiff. The judgments had been taken *pro confesso*, and after such judgments there had been an account taken that resulted in the ascertainment of certain sums due from the plaintiff here to the parties suing in *Newfoundland*. Therefore, as far as that goes there was final judgment, because the amount due had been ascertained, and actions were actually brought in this country upon those judgments for the purpose of enforcing them here. It was said that the decision there was wrong upon grounds which were the subject of appeal to the Privy Council, and the plaintiff here (the defendant there) commenced his suit for the purpose of restraining those proceedings in the Court of Queen's Bench in this country to enforce those foreign judgments. The facts were sufficiently fully stated to enable the defendant here to raise the point by demurrer, and that course was adopted. The demurrer was allowed on the ground that the judgment obtained abroad was final, subject, of course, to the appeal to the Privy Council, which would correct it if wrong; and the plaintiff could not have a fresh account taken here upon the ground of irregularities in the judgment there, if such there were, or upon the ground that certain points were raised here which were not raised there, but which might have been raised there if he had chosen so to raise them.

The next case was *Ostell* v. *Lepage* (2) before Vice-Chancellor *Parker*. The facts are sufficiently stated for the present purpose in the marginal note; "The plaintiff, resident in *England*, carried on business in *India* and *England*, in partnership with the defendant, who resided in *India*. Questions having arisen between them, the plaintiff filed a bill in the Supreme Court of Equity at *Calcutta*, against the defendant, for an account and for an

(1) 3 Hare, 100. (2) 5 De G. & Sm. 95.

injunction and receiver. Pending the suit, the defendant left *India*, and came to and resided permanently in *England*; and eventually the bill was taken *pro confesso*" (that means the bill in *India*), "and a decree was made, referring it to the Master to take the accounts. The plaintiff then filed her bill in this country, alleging, that, by reason of the absence from *India* of the defendant, the suit there could not be prosecuted; and praying relief here similar to that sought in the suit in *India*." Then the defendant pleaded the existence of the decree of the Court in *India*, and the proceedings there in bar to the bill, and the plea was overruled. The Vice-Chancellor says this (1): "A decree or sentence of a foreign Court may be pleaded in bar of a suit for the same matters here; but then it must be a final decree: *Garcias* v. *Ricardo* (2). Now, here there has been a decree in *India*, but it is not a final decree. The plea consequently is of a suit pending in *India*. Now, if both suits are pending in this country in Courts of concurrent jurisdiction, there is no doubt that a plea of such a pending suit is a good plea; in such a case the second suit is vexatious, and no reason can be suggested why they should both proceed. But that is not a very extensive principle. Thus where there is an action at law and a bill also for the same matter, the Court will compel the plaintiff to elect with which he will proceed; but the defendant cannot plead the pending action in bar to the suit. But how would it be with respect to a plea of a suit pending in a foreign or colonial Court? In every case of a plea of a pending suit in a foreign Court reasons have been found for overruling the plea. In *Bayley* v. *Edwards* (3), Lord *Camden* certainly entertained an unfavourable opinion of such a plea. Now, with respect to the present case, the plaintiff has sued the defendant in *India*, and he, pending that suit, has come to *England*; and, to a bill in this Court against him for the same matters, the defendant by his plea alleges, that the plaintiff ought not to take any proceedings against him here, but that she must go on with the suit in *India*, in which the plaintiff can now have no direct process of contempt against the defendant, and can obtain no discovery

(1) 5 De G. & Sm. 105. (2) 14 Sim. 265; 12 Cl. & F. 368.
(3) 3 Swans. 703.

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from him. It also appears that both bills pray for an injunction, which, upon the *Calcutta* decree, would be of no avail in this country. Both bills pray for a receiver, as to which the same remark applies. The defendant's proposition is, that the plaintiff is to go on with her suit in *India* to its conclusion, and that she may then file a bill in the nature of a supplemental bill here. This would amount to a failure of justice; for the decree in *India* has been obtained upon taking the bill *pro confesso* against the defendant; and it is plain, that, in such a suit for an account no effectual relief can be obtained in *India*. The proper course in such cases is to apply here to stay proceedings in one or other of the suits, and the Court will, upon such an application, have no difficulty in putting the plaintiff under terms." In that case, therefore, the Court had the state of circumstances before it, to which Lord *Camden* referred in *Bayley* v. *Edwards* (1); a case in which the parties were moving about from one jurisdiction to another, and the defendant having moved from *India* to *England* pending the action, it was held that it was a case in which the plaintiff ought to be allowed to take proceedings here. In the present case, if the proceedings abroad had been nullified and rendered practically useless by the Defendants moving to *England* pending the action, so that no relief could be prosecuted against them there, that case to which I have referred and Lord *Camden's* remark in *Bayley* v. *Edwards*, might have some application. The decision (2) was not appealed from, but the proceedings in *India* went on, and resulted in the Master making a report and further proceedings being taken, in the course of which a compromise was arrived at. An order was made on further directions, by which the Court at *Calcutta* declared that the proposal for a compromise was for the benefit of the infant, who was the plaintiff in the action, and made a decree accordingly, and it was ordered that the defendant should be at liberty to carry out the terms of the compromise. That being so, there having been that decree, the defendant then applied to Vice-Chancellor *Stuart* to stay proceedings in the English action. He took the hint that had been given by Vice-Chancellor *Parker* in the final passage in his judgment which I read, and not appealing from

(1) 3 Swans. 703. (2) 2 D. M. & G. 892.

that decision moved here to stay proceedings upon the ground of the compromise. Vice-Chancellor *Stuart* made the order (1), from which the plaintiff appealed. The Lord Justice *Knight Bruce* pointed out that, for reasons which he gave, he was not satisfied that the compromise was binding upon the parties or that a final decree had then been arrived at. Lord *Cranworth* took the same view, but he said, speaking on the general point (2), "It is another question, whether this Court will interfere in the manner now proposed upon motion. I do not mean to say that cases may not exist when the Court will so interfere. I think it would be very dangerous to repudiate such a jurisdiction, because the want of it might leave room for great oppression. But when the Court interferes upon motion to stop the plaintiff from proceeding, it is taking upon itself a very delicate jurisdiction, and one in which it ought to see that by no possibility can it be doing injustice." Then he refers to various reasons for saying that what was done there did not exhaust all the proceedings, and he pointed out that it was alleged by the bill in *England* that, after the dissolution of the partnership, business had been carried on in *India* by means of the capital and property belonging in part to the intestate's estates, and the business had been carried on solely for the purpose of winding up the same, but that divers purchases of stock had been made; and it prayed, among other things, for a dissolution of that as an existing partnership. Then he says (3): "The decree at *Calcutta* does not give and cannot affect to give any relief in respect of those matters. It may be that the defendant may have a perfectly good answer, either by way of plea or some other mode, as to so much as was adjudicated on in *Calcutta;* but the present order prevents the plaintiff from obtaining relief on those matters as to which it is plain there has not been, and could not be, any adjudication in *Calcutta.* I think that the order was erroneous." That, therefore, proceeds upon different grounds altogether from anything before me.

The case of *Cox* v. *Mitchell* (4) has been explained in the cases to which I am about to refer, and I do not think it necessary to mention it further than by saying that in that case there was an

(1) 16 Jur. 1134.
(2) 2 D. M. & G. 896.
(3) 2 D. M. & G. 897.
(4) 7 C. B. (N.S.) 55.

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action pending in *England* and an action pending in the *United States* for the same thing. No judgment had been obtained in either, and the Court declined to interfere.

The next case I come to is the most important of all. It is that of *McHenry* v. *Lewis* (1). The facts were shortly these. An action of *Conybeare* v. *Lewis* had been instituted in *England* in 1879; in July, 1881, another action of *McHenry* v. *Lewis* had been instituted in *England* also; and in August, 1881 (that is the following month), an action of *Conybeare and McHenry* v. *Lewis* had been instituted in the *United States*. Each suit sought relief that could not be obtained in the other country, and the last action in the *United States* embraced a company and other defendants who were not defendants here, and who were, as the Master of the Rolls pointed out, essential defendants. In neither had any decree been made, but the action in the *United States* was brought after a motion had been made in the English action, which motion had failed for want of parties who were made parties to the action in *America*—the company and others. The Master of the Rolls says this in the judgment of the Court of Appeal (2): "The question is, whether or not when an action is brought by a man in this country against a defendant and the same plaintiff brings an action in a foreign country against the same defendant for the same cause of action, this Court has jurisdiction in a proper case to stay the action in this country on the ground that the defendant is doubly vexed by reason of the action being brought also in a foreign country. Notwithstanding what has been said about the case of *Cox* v. *Mitchell* (3), I am of opinion that there is such a jurisdiction in this Court, and that it is part of the general jurisdiction of the Court to prevent a defendant being improperly vexed by legal procedure. I see no reason on principle why, if the Court is satisfied that the defendant is being improperly vexed, the mere fact of one of the actions being in this country and one in a foreign country should prevent the Court protecting the defendant from being so improperly vexed. So much for the general jurisdiction. Now I am not sure that what I have stated really conflicts

(1) 22 Ch. D. 397. (2) 22 Ch. D. 399.
(3) 7 C. B. (N.S.) 55.

with the judgment of the Court of Common Pleas in the case of *Cox* v. *Mitchell* (1). In one view it does not so conflict. If the true view of the judgment is, that *primâ facie*, a man is not doubly vexed when the action is brought in the two countries, but that you want a special case to shew that he is doubly vexed, then there is no conflict of opinion. If, however, it means that in no case can the Court interfere, then I must admit, with the greatest deference to the four learned Judges who decided *Cox* v. *Mitchell*, I should not be prepared to indorse their opinion." Then he says, "It appears to me that very different considerations arise where both the actions are brought in this country, and where one of them is brought in a foreign country. In this country, where the two actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *primâ facie* vexatious to bring two actions where one will do. And, indeed, this has been recognised, I believe, for ages by the practice of the old Court of Chancery, which always put a plaintiff to his election by an order of course if he was suing for the same cause of action, both at Law and in Equity. The same principle applies, it appears to me, wherever the judgment can be enforced, and for that reason I think that the case of *Lord Dillon* v. *Alvares* (2) can no longer be relied on." That was in respect to proceedings in *England* and *Ireland* respectively. Then a little further on he says, "It is possible that the same observation might be made as regards the Queen's Courts in any other part of the world, but that of course may be subject to exception as regards the nature of the remedy. But where it is in a foreign country it certainly appears to me that we cannot draw the same inference. Not only is the procedure different, but the remedy is different." Then he points out why. The remedies in *England* and in a foreign country might be totally different. In *England* they might be larger in one respect and less in another. Then he proceeded to consider whether in that particular case a special case for vexation had been made out. Then he pointed out what the frame of the action was. Then he says (3), "In order

(1) 7 C. B. (N.S.) 55. (2) 4 Ves. 357.
(3) 22 Ch. D. 402.

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to try the *bona fides* of *McHenry's* first action"—that I should say was the second in point of date; it was the one commenced by *McHenry* in *England* in July, 1881—"you must see what it is for, and it is not suggested by the present appellants that one action, at all events, does not raise a substantial question which is proper to be raised and proper to be tried. Therefore it is not a case of a frivolous action in any sense of the word, nor of a vexatious action. The vexation, if any, consists in bringing several proceedings to try the same question or series of questions." Then he referred to the motion that had been brought, and said that it failed "because the *American Railroad Company* and the directors of that company were not parties to it, and thereupon, or soon afterwards, the American action was instituted, making them parties. That seems to me to be the strongest evidence to shew that the American action was brought because the English action had failed to that extent, and it does seem to me very good evidence that the second action was brought in good faith." Then he pointed out that there was no judgment in either. He says, "No special case is made out for stopping the American or the English actions, but on the contrary, there is a special case for two actions; because you can only enforce the claim of the plaintiffs directly by getting judgment in both countries. At the same time I cannot help thinking that if I could see my way to have the question which is the main question in dispute litigated once for all, I would do so. But then it will be, I suppose, decided in one action before it will be decided in the other. It will not be decided at the same moment, and it does seem to me that when judgment is pronounced in one action some application may be made which will prevent the other action proceeding." Then he pointed out that they ought not therefore to stay the English action. Then he dealt with what he calls the third action, being the first in point of date—that of *Conybeare* v. *Lewis*—and his remarks there are not material for the present purposes. Then Lord Justice *Cotton* commented on *Cox* v. *Mitchell*, and said (1): "I cannot accede to that case if it lays down as a general principle that this Court cannot interfere where one of the actions is in *England* and the

(1) 22 Ch. D. 405.

other in a foreign Court." Then he cites certain passages which I do not stop to read now, and he agrees altogether with the Master of the Rolls. He says at the end (1), "It must be vexatiously harassing the defendant on the part of the plaintiff, whose action is sought to be stayed; and I can see, as the Master of the Rolls has pointed out, some things which may make it necessary, or at all events desirable, for the plaintiff, without being vexatious, to prosecute the two suits. Therefore, in my opinion this appeal must fail." Then Lord Justice *Bowen* gives judgment to the same effect, and at the end Lord Justice *Cotton* adds the remark, "I wish to add that which I omitted, that the case might be very different after decree obtained in either of the suits."

Then the matter came before the Court of Appeal again in the *Peruvian Guano Company* v. *Bockwoldt* (2). That was an action in *England* with respect to the guano cargoes of seven vessels. Pending the action, six of the vessels were moved to the *Seine*, and thereupon the plaintiff commenced an action in *France* as to those six. It was a case, therefore, in which the defendants had not moved, as in *Bayley* v. *Edwards* (3) and in *Ostell* v. *Lepage* (4), but the subject of the action itself was moved; and the Court came to the conclusion that it was impossible to say that there might not, as to the six cargoes, be a far better relief obtained in *France* than could have been obtained in *England*. As to the seventh, there was no suggestion that relief could be obtained in *France*, and the action in *England* would have had to proceed in respect of that. The Master of the Rolls referred to his previous judgment, and after referring to two actions in one country being *primâ facie* clearly vexatious, said (5), "Similar, although not perhaps the same, considerations apply in a case where the actions are brought, one in a foreign country and one in this country. I have recently had to consider the matter in the case of *McHenry* v. *Lewis* (6), and I went so fully into it that I do not think it is necessary for me to discuss the rule further. It may be put, as regards this case, shortly in this way: that it is not vexatious to bring an action in each country where there are

(1) 22 Ch. D. 407.
(2) 23 Ch. D. 225.
(3) 3 Swans. 703.
(4) 5 De G. & Sm. 95.
(5) 23 Ch. D. 230.
(6) 22 Ch. D. 397.

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substantial reasons of benefit to the plaintiff. He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right? It is very unpleasant, no doubt, to be sued twice—it is unpleasant to many people to be sued once—but still that does not make it vexatious where the plaintiff seeks to get a real substantial advantage." Then he pointed out reasons why that might be said in the case there, and the other Judges took the same view.

Then in *Hyman* v. *Helm* (1) similar points were raised again before the Court of Appeal; though it was not a precisely similar case. In that case, certain plaintiffs were resident in *San Francisco*, and they brought an action in *England* against the defendants, who lived at *Manchester*, upon the ground that the defendants were the *Manchester* agents of the firm carrying on business at *San Francisco*. What they asked for was an account and for relief in respect of certain alleged fraudulent dealings, as in the present case. The defence of the defendants was that they were not agents. They set up settled accounts, and they said there was a sum of £2880 due to them. Then the defendants brought an action of their own in *San Francisco*, asserting that they were principals for the purpose of recovering that sum there against the *San Francisco* firm. Then the plaintiffs in *England* moved here to stay that action in *San Francisco*. No judgment had been obtained at the time of the motion in either action. The Court refused to interfere, because it said there was no vexation and no oppression. It was held that the right to accounts here went upon the footing that the defendants were agents. The action there was based upon a totally different ground—upon the ground that the parties suing in *San Francisco* were principals and not agents. It, therefore, was a case in which the actions were not both brought by the same persons, but by different persons, and the defendants sued in a different character abroad from the character in which they were sued here. But the same principles to which I have referred before are recognised.

Then the only other case cited was *The Christiansborg* (2).

(1) 24 Ch. D. 531. (2) 10 P. D. 141.

That was like *McHenry* v. *Lewis* (1) in this—that the same person was plaintiff in both proceedings. The plaintiffs arrested in *Holland*, by their suit in the Admiralty Court there, a ship belonging to the defendants. The ship was then released upon a guarantee being given which was arranged between the parties. She then came to *England*, and she was then arrested here. Then the defendants moved for the release of the ship, and when that motion came on to be heard the plaintiffs said that they were willing to give up all their proceedings in *Holland*, to release the guarantee, and to pay the costs; but they said they wanted to go on with their proceedings here because they preferred the Admiralty jurisdiction in *England* to the Admiralty jurisdiction there. The plaintiffs moved to stay the action, as I said, and Sir *James Hannen* gave judgment. He said this (2): "The principle on which I think that this question should be determined is, that where an action has been brought in one Court, and it is not shewn that such Court would not do justice, it is *primâ facie* oppressive to institute an action in any other Court. In this particular case no facts are brought to my knowledge to shew that the Dutch Court would not do full justice, and as full justice between these two foreign ships as the English Court." He says lower down, "There is a *lis alibi pendens*, for a suit was instituted by the plaintiffs in a Dutch Court against this vessel, which they found within the jurisdiction of the Dutch Courts. Of course they could have brought an action here, if they had good cause for so doing, but, as I have already pointed out, they do not shew any such good cause. It is true the plaintiffs have expressed their willingness to abandon the action which is pending in the Dutch Court, but in the meanwhile the defendants, who were compelled to come into the Dutch Court, have naturally taken cross-proceedings, and the Dutch Court therefore is seised of the litigation, and without the consent of the Dutch Court, and until it has dismissed the action, and has said that it cannot entertain it, it is a *lis alibi pendens* in *Holland*." Then that decision was the subject of appeal, and Lord *Esher*, in his remarks, seems to have thought that Sir *James Hannen* might have been wrong in staying the proceedings absolutely, so that

(1) 22 Ch. D. 397. (2) 10 P. D. 143.

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the plaintiffs could never proceed in this country, but that was a point which it was not necessary to decide as the case went on. Then he referred afterwards to the case of *McHenry* v. *Lewis* (1), and said (2), "The late Master of the Rolls gave a most important judgment, which I should have thought would have settled the law." I do not go through the reasons that he gives. He discussed the matter very fully, and then he said (3), "Where both actions are in *England* in the same tribunals—because if they are in tribunals where the proceedings are not identical or the remedies are not equally effective the law would apply which is applicable to foreign countries—*primâ facie* it is vexatious, and therefore it would lie on the party who brings the second action to shew that it was not so. But where the cases are in foreign countries, *primâ facie* not being vexatious, the man who says it is, must prove clearly to the Court that it is, and that the person suing him in a Court with ample jurisdiction would have in every respect the same chance in a foreign Court which he has here, and equal facility to enforce the remedy." Now, putting it shortly, there he distinguishes on the one hand between cases in which both proceedings are in this country, and cases in which the proceedings are partly in this country and partly in a foreign Court, and by foreign Court he means, not colonies of this country, but a country like the *United States* or *France*. Then he points out what rule would apply in his opinion to the intermediate cases where one proceeding is pending in this country and another in a country where it is not absolutely a foreign Court with a different procedure; and, to use his own words, "In tribunals where the proceedings are not identical or the remedies are not equally effective the law would apply which is applicable to foreign countries." That is to say, if the proceedings could not be so effectively prosecuted in the colony as in *England*, apparently he would consider that the colony or the Consular Court, or whatever it was, might be treated upon the same footing as if the proceedings there were proceedings in a foreign country. Then he dealt with that particular case, and speaks of the proceedings in the municipal Court in *Holland*. He says (4), "The Admiralty Court

(1) 22 Ch. D. 397.
(2) 10 P. D. 145.
(3) 10 P. D. 148.
(4) Ibid. 150.

in *Holland* is therefore a municipal Court of a foreign country. That being so, it is not vexatious, according to the authorities, to have instituted suits in two Courts, one being a foreign Court." By not vexatious he means not *primâ facie* vexatious; the fact of there being two proceedings is not of itself sufficient to shew it is vexatious. "But I think that Admiralty Courts are not within the full authority of the proposition as to foreign Courts, because the way in which they exercise their jurisdiction in all countries, as far as I know, is by seizing the ship and by letting her go on bail being given according to the practice of the Court. If bail, therefore, be given in one Court, and when the action is instituted in the other bail is to be given again, I think that that could not be allowed, if the party who sues in the second Court insists on preserving the bail in both Courts. I think it would be vexatious in fact to call upon the owner of the ship in respect of the same cause of action to give bail in the two Courts at the same time. In such a case the party who objects to the action proceeding in the second Court has satisfied to a certain extent the burden of proof, which lies upon him, and has shewn that it would be vexatious to allow, without terms, the matter to go on in a second Court upon that ground." But then he went on to point out that it was not a case in which bail had been given but a case in which the parties had, by agreement *inter se*, substituted a personal guarantee, which might be the subject of a claim by way of action, but could not be the footing of further proceedings in the Admiralty Court. He held, therefore, that there could be effective proceedings here in the Admiralty Court, but there could not there, because the matter had been taken out of the Admiralty Court, and a personal remedy at the best substituted. The result of it was that he, not in terms, but in effect, took the view which the Master of the Rolls expressed so concisely in the *Peruvian Guano Case* (1)—that it was not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff.

Now applying those cases, here there are two actions brought by the Defendant *Binney*, one in the Colonial Court and another here. It seems to me that it cannot be said that *Binney* is wrong

(1) 23 Ch. D. 225.

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in taking proceedings here—it is not vexatious to take proceedings here—if there are substantial reasons of benefit to him. Now what are those substantial reasons? For those I look to the counter-claim. The counter-claim refers to the proceeding in the Court in *Honduras*. It says the accounts have not been concluded. Nothing has been done except certain accounts directed. That is not quite correct, because to some extent accounts have been taken, but they are certainly not concluded. Then it says that in that case the present Judge was engaged as counsel and solicitor in the suit, and is the only Judge in the colony. In my opinion that of itself is not a ground for taking proceedings here. What is to be done is to take certain accounts, and no doubt it may be that the Defendant, the person who has complained in the counter-claim, might be entitled to certain relief or assistance here if circumstances arose giving rise to it; but the mere fact that such a change as that has taken place is not, in my opinion, sufficient to entitle him to have all the accounts of the partnership taken over again, but that is what he asks.

Then the counter-claim says, "The Clerk of Courts by whom the accounts and inquiries directed by the said order of Her Majesty in Council would have to be taken and made was also formerly engaged as solicitor in the said suit." A Court there can take care that the accounts are taken in the proper way and by proper persons, and no difficulty of that sort can arise. I am of opinion that the suggestion that that person who was the solicitor has become Clerk of Courts now would not make any difference, because the Judge there has complete jurisdiction to take care that the accounts are taken before a proper impartial person, and I have not the least doubt that he will do so.

Then it is said that it is impracticable to appoint in the colony a suitable person as receiver of the assets and to get in the partnership outstandings. In the present case a receiver is asked for.

As regards the receiver, it is stated in the sixth paragraph of the counter-claim: "A receiver ought to be appointed to collect and get in all the partnership outstanding debts, property, and effects, and the several partners should be directed to concur in all necessary powers of attorney for the employment of suitable agents in the colony or elsewhere to act on his behalf: and

the plaintiffs should be restrained by injunction from any further trading with the partnership assets now in their hands and in excess of their share thereof." It is difficult to suppose that there is no suitable person in the colony to be appointed receiver. If there is not, one must be imported from some other place. As regards the jurisdiction to appoint a receiver, I have no doubt of it. The Privy Council referred to it in its judgment, and it is one of the things which I think the Court has inherent jurisdiction to do. As to the person to be so appointed, if there is not a proper person there, as I have said, one must be imported for the purpose, and the Judge there is quite competent to find a person in *Jamaica*, or *New Orleans*, or in *London*, if he pleases, to act as receiver there, and the suggestion that there is not a suitable person there presents just as much difficulty to me in appointing a receiver here as there would be in appointing a receiver there. But then there is this further difficulty about it. What I am asked to do is to take an account of all the partnership properties, and appoint a receiver to get in all the partnership credits, properties, and effects. If I were to do that, and to appoint a person receiver, whether he was resident there or here, or wherever it might be, I should be interfering directly with what the Court has done there. The Court has directed that accounts be taken, and it is ordered that the partnership books are to be put into the hands of persons appointed by the Court as accountants to take the accounts in pursuance of the course of practice there adopted. If I were to appoint a receiver here to take possession of all the assets, I should be going directly in the teeth of the order of the Judge there who is winding up the partnership in the *forum* which the Defendants here selected as the proper place to do it, the place where the partnership books are in the hands of officers of the Court, and where the business is actually carried on by the Defendants. It seems to me absolutely impossible that I can appoint any such receiver here, as I am asked to do.

The case would be different if I were merely asked to assist to give effect to the decree there in consequence of there being assets in this country with respect to which a receiver there could not do anything. If this were a suit ancillary or

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supplemental to the winding-up there, the matter might stand in a very different position; but it seems to me absolutely impossible to do what is asked—to appoint a receiver of the partnership assets.

Then it is suggested further that the Plaintiffs have been dealing with sums received by them out of what had been the partnership assets, and have been improperly dealing with the Plaintiffs' share therein. If there is any reasonable ground of complaint on that head the Defendant *Binney* may have a right of action in respect of that, but any such complaint on his part as that is not a matter that could be fairly taken into consideration in taking the account of the partnership assets which I am asked to take by the counter-claim here.

Under these circumstances it appears to me it would be highly inconvenient and unreasonable to attempt here to grant that partnership decree which the Defendants ask. And there are other difficulties in the way. One is this. The applicants here are the Defendants *Binney* and *Niven*. Now *Niven* is not a partner at all, and he has no interest whatever in the partnership assets. The way in which it is said that he has an interest in them is this. When the partners employed the *London* firm as their agents one of the terms was that the *London* firm were to act as general agents for the *Honduras* firm, and to keep two accounts in their books, one being a general account shewing a debit, the amount due to them from year to year, including *Binney's* share of profits and bearing interest at the rate of 5 per cent. In my opinion that does not give the *London* firm any right to sue for a dissolution of partnership. *Niven* has no interest in that. It is quite true that during the time when the agency was subsisting one of the items in the account between the two firms was to be the sum coming due to Mr. *Binney* from the partnership. But the agency is at an end now. Accounts have to be taken no doubt, but the agency has ceased. The partnership has ceased, and there is nothing whatever now entitling the *London* firm to sue the partners there. They may possibly be creditors of theirs in some way—but that is a very different thing from saying that the *London* firm are in any way in a position to take proceedings for the dissolution, or for the winding-up of a dissolved partner-

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ship out there. Therefore it seems to me that it is quite wrong for the Defendants *Binney* and *Niven* to put in any such counter-claim as has been put in here. It may be said, no doubt, that that at the utmost is a case of misjoinder, and that misjoinder is no longer fatal to an action, as in some cases it used to be. But it is highly inconvenient that there should be now any order made in an action at the suit of *Binney* and *Niven* for the purpose of taking partnership accounts, when, if *Binney* died pending the action, the carrying on of that action would be by the survivor *Niven*, a person who is not a partner, and has no interest whatever in the taking of the partnership accounts. It seems to me therefore that it would be highly inconvenient, to say the least of it, to allow a claim of this sort to be set up thus by way of counter-claim in the present action.

Then there is this further—it seems to me that taking the accounts between the three partners is a matter so totally different from the subject-matter of the action by the *Honduras* firm against the English firm, to charge them with improperly putting into their own pockets what ought to have been accounted for to the *Honduras* firm, as to make it neither convenient nor expedient that the two matters should be dealt with in one action.

It appears to me, therefore, that the present application is well founded, and that I must strike out the counter-claim; but as I have said before, in coming to this conclusion I do not in any way mean to intimate that there may not be a case entitling the Defendant *Binney* to take some proceedings in this country for the purpose of facilitating the winding-up of the partnership so far as the Court that he has selected is unable, from the situation of the parties or otherwise, to give full effect to it.

D. P.

C. A.

The Defendants appealed, and the appeal was heard on the 30th of March, 1887.

Sir *H. Davey*, Q.C., *Cookson*, Q.C., and *Cowell*, for the Appellants:—

This order must have been made under Order XXV., rule 4, or Order XIX., rule 27; apparently it was made under the former.

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[*J. Cutler*:—The Judge relied also on Order XXI., rule 15.]

Mr. Justice *North* held that the counter-claim shewed no reasonable cause of action, founding his decision on the cases as to concurrent suits in this country, or in this country and *Scotland*. But even in those cases the most that can be done is to put the Plaintiff to his election with which suit he will proceed. We say that Mr. Justice *North* mistook the law, and that where one action is abroad, it lies upon the parties who object to concurrent proceedings going on, to shew why the action here should be stayed. The Respondents may rely on the fact that a decree has been made in *Honduras*, and there are cases to shew that a decree abroad is a bar to proceedings here; but the observations in those cases only apply where there has been a final judgment which concludes the rights of the parties: *Bayley* v. *Edwards* (1); *Ostell* v. *Lepage* (2). In *McHenry* v. *Lewis* (3), it was held that there is no presumption that the multiplicity of actions is vexatious where one is in a foreign Court and the other here, and that a special case must be made, though it is otherwise where one action is here and the other either here or in *Scotland* or *Ireland*, a judgment in the Courts of which can be enforced here. The case of *Peruvian Guano Company* v. *Bockwoldt* (4) proceeds on the same lines. *The Christiansborg* (5) does not affect our case, the decision went on the ground that the English proceeding was against good faith. In the present case, owing to the peculiar terms of the agreement between the *Honduras* firm and the English firm, the relief sought by the Plaintiffs here cannot be worked out without taking the accounts of the partnership as between *Binney* and the Plaintiffs, and *Niven* as a partner here is interested. It has been suggested that this is not a proper case for counter-claim, but *Beddall* v. *Maitland* (6) disposes of that objection.

Cozens-Hardy, Q.C., and *John Cutler*, *contrà*:—

This is a case where a person having obtained a decree in a Colonial Court asks for a similar decree here. The business

(1) 3 Swans. 703.
(2) 5 De G. & Sm. 95; 2 D. M. & G. 892.
(3) 22 Ch. D. 397.
(4) 23 Ch. D. 225.
(5) 10 P. D. 141.
(6) 17 Ch. D. 174.

was conducted in *Honduras*, the managing partners are there, the books are there, and the decree usual in a partnership suit was made there. The tribunal was a proper one, selected by *Binney* himself, and a proper decree has been made under which the accounts have been proceeded with though not concluded. This Court ought not to assume jurisdiction in a matter which *Binney* himself has submitted to another tribunal. It is against principle to allow *Binney* to carry on two proceedings unless he shews that he can get relief in the second which he cannot get in the first. A distinction is drawn in *McHenry* v. *Lewis* (1) between the case where a decree has been made in the first action and a case where proceedings are merely pending.

[COTTON, L.J. :—Where the decree which has been made adjudicates on the rights of the parties there is an important distinction.]

There has been an adjudication on the rights here: *Binney* v. *Mutrie* (2). The rules as laid down in *Peruvian Guano Company* v. *Bockwoldt* (3) are in our favour. The Judge here has exercised his discretion as to allowing the counter-claim, and the Court of Appeal will not interfere with it: *Huggons* v. *Tweed* (4). *Niven* has no right to an account of the *Honduras* business.

[Sir *H. Davey*:—He is interested, and will undertake to be bound by the *Honduras* proceedings.]

COTTON, L.J. :—

This is an appeal against an order of Mr. Justice *North*, who has struck out altogether a counter-claim put in by the Defendants. The action is brought by Messrs. *Mutrie & Currie*, who carried on business at *Honduras* in partnership with Mr. *Binney*, against Mr. *Binney* and Mr. *Niven*, who carry on business in partnership in *England*, and who acted as agents for the *Honduras* firm. The agreement between the *Honduras* firm and their agents in *England* is very peculiar, because it introduces into the accounts of the English agents part of the profit of the *Honduras* firm, it being provided that Mr. *Binney's* share of the profits of the *Honduras* firm was to be brought into account as between

(1) 22 Ch. D. 397.
(2) 12 App. Cas. 160.
(3) 23 Ch. D. 225.
(4) 10 Ch. D. 359.

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the *Honduras* firm and their English agents to the credit of the English agents and to the debit of the *Honduras* firm. Therefore, before it could be ascertained what balance on those accounts was payable by the English agents to the *Honduras* firm it had to be ascertained what was the share of Mr. *Binney* in the profits of the *Honduras* firm. This action is brought by the *Honduras* partners of the *Honduras* firm against their English agents to charge the English agents with certain sums which they ought to have allowed the *Honduras* firm, the Plaintiffs alleging that the English firm got the benefit of commissions for which they ought to have accounted to the *Honduras* firm. There would come into the general account between the *Honduras* firm and the English agents the sums which I have mentioned if the Plaintiffs succeeded in recovering them, and there would also be brought in the share of Mr. *Binney* in the profits of the *Honduras* business. I do not see how the accounts can be finally taken as between the *Honduras* firm and the English agents until the partnership accounts are taken so as to ascertain what is Mr. *Binney's* share of profits which is to form an item in the account. Mr. *Binney*, who was a partner in both firms, brought an action in the *Honduras* Courts for the purpose of taking the partnership accounts, and by his defence in the present action he denies the allegation made in the action, and by his counter-claim he claims to have the partnership accounts taken. Mr. Justice *North* has simply struck out this counter-claim.

It was pressed upon us that Mr. Justice *North*, in the exercise of his discretion, considered that this counter-claim could not be conveniently tried with the original claim, and that we ought not to interfere with the exercise of his discretion. He never, as it appears to me, exercised any such discretion at all. The strong point in my mind against his decision is that the profits due to *Binney* as a partner in the *Honduras* firm must be ascertained before the accounts between the *Honduras* firm and the English firm can be finally settled. By the counter-claim the Defendants seek to get a decision on a matter which must be decided before the final adjudication of all the questions arising between the Plaintiffs and the Defendants can be made. Now, what ought to be done? Undoubtedly if there had not been this action

brought by the *Honduras* partners I should have thought it would have been wrong for Mr. *Binney* to bring a fresh action in *England* for taking the partnership accounts, when he had already got a decree for that purpose in *Honduras*. Such fresh action would have been vexatious and the Court would have stayed it. But although a decree has been made in the *Honduras* action there has been no final winding-up of that action, and it would be difficult finally to wind it up until this action is tried—the two depend the one on the other, and in my opinion it would be wrong now to strike out entirely the counter-claim so as to prevent the Defendant *Binney* from asking at the trial of this action for such a decree as may be right, having regard to the then state of the proceedings in the *Honduras* action, though he certainly cannot be allowed to raise again here any questions which have been decided by a competent tribunal as between him and the Plaintiffs in the *Honduras* action. *Niven*, who is not a party to the *Honduras* action, has undertaken to be bound by any adjudication or decision in the *Honduras* action, of course including anything which may be decided on appeal by the Privy Council.

In my opinion the proper course will be to discharge the order which has been made by Mr. Justice *North*, but of course that will be without prejudice to any application that may be made if and when all proceedings in the *Honduras* action have been finally wound up so far as to determine what, apart from the claim in this English action, are the profits of *Binney* and what is the state of accounts. If the *Honduras* proceedings go on rapidly, an adjudication which will settle all matters and all accounts between the parties with the exception of the claim made in the English action, may be speedily obtained. If so, that can be considered in determining what will be the ultimate balance on the accounts to be taken in this action. I in no way encourage the opinion that if the whole of the accounts of the partnership, with the exception of the claim to get in this asset, had been decided in the *Honduras* action, it would have been right to make a decree here again that those accounts should be taken. But what has been done by the order under appeal has this effect, that if anything should happen to prevent the *Honduras* action from being worked out, the Defendant *Binney*

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will be precluded from getting such a decree or order as will enable him to make perfect those proceedings in the *Honduras* action which have only gone to a certain length, and which may possibly in certain events never go further. The Plaintiffs in this action are very confident as to the quickness of the *Honduras* proceedings. If that confidence proves well founded they may before the trial of this action get the matter settled in that action so as to bind *Binney* and *Niven*, in which case there will be no further inquiry or decree in order to settle what will have been already settled in the *Honduras* action.

In my opinion the appeal succeeds, and on the undertaking of *Niven* to be bound by any decision in the *Honduras* action, we discharge the order.

LINDLEY, L.J.:—

This application is an appeal from a very simple order of Mr. Justice *North* which has struck out the Defendants' counter-claim, and it is unnecessary for us to consider what kind of decree will have to be made or ought to be made when the English action comes on to be heard. That is not the question before us. It does not in the least follow because the Defendants by their counter-claim ask for a general account of the partnership dealings and transactions that they will get it, or that if they get it they will get it in an unqualified form. It is quite competent to the Court when the case comes on to make such a decree for an account as is required by the circumstances of the case, having regard, amongst other things, to what has been done abroad, but the only question we have to consider is, whether it is right to strike out the whole of this counter-claim. It appears to me that it is not right. If Mr. Justice *North* had exercised his discretion in this way, if he had thought that as a matter of convenience it was better that the Defendants should have their counter-claim struck out and commence a fresh action in the High Court, of course we should have been very unwilling to take a different view, for the Court of Appeal is slow to interfere with the discretion of the Judge. But that is not the case. He has proceeded upon a principle that by reason of the pending proceedings in *Honduras* between Mr. *Binney* and his co-partners

for taking the accounts of the *Honduras* firm this counter-claim is wrong and ought to be struck out. In other words, he has come to the conclusion that this counter-claim asking for accounts of that same partnership in this country is vexatious and oppressive, and ought to be dealt with accordingly. That is the substance of the view which he has taken.

Now in order to deal with that view we must look at what the claim is. The claim is not a mere claim by the *Honduras* firm to get in a partnership asset or a sum of money due from the English firm to the *Honduras* firm. It goes far beyond that. The object of the claim is to get in that asset, and to distribute it amongst the partners of the *Honduras* firm. That is the key to the whole case. How are you to distribute an asset of the firm without taking the accounts of the firm? It does not at all follow, as I said just now, that in this English action the accounts which have been taken in the *Honduras* action are to be taken over again. Those accounts can of course be adopted as far as they go, and such order can be made as the justice of the case may require, but in some shape or another the partnership accounts must be taken if any asset is to be distributed among the partners. We see that every day in the case of the sheriff seizing by *fi. fa.* the share of a partner in certain assets of the firm. You have then to find out what the share of the partner is in the assets seized. We all know that this cannot be done except by taking the partnership accounts, and therefore when the Plaintiffs ask for the distribution of the asset they inevitably let in the taking of the partnership accounts. I do not say that the Defendants will be entitled to an order for taking the accounts of the partnership, it may be necessary or desirable to modify it, but it strikes me as altogether wrong to say that they shall not raise such a point by way of counter-claim. Then it is said, and said truly, that Mr. *Niven* is not in a position to ask for an account of the *Honduras* firm. That is perfectly true. But on the other hand, having regard to the peculiar nature of the agreement between the *Honduras* firm and the agents, it seems to us that such an account as is asked here by the Plaintiffs cannot be granted in the absence of Mr. *Niven*, and I do not see how it is possible to distribute the asset without Mr. *Niven's* presence in

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some shape. Then it is said that he is not bound by the *Honduras* proceedings. That is true. But the difficulty is met by the undertaking given by Sir *H. Davey*, and on that undertaking it seems to me that the only right order is to allow the appeal and discharge the order appealed from.

LOPES, L.J. :—I agree.

Solicitors: *Rooke & Sons; Parker, Garrett, & Parker.*

H. C. J.

C. A. 1886 KEKEWICH, J. *Dec.* 8, 9, 11, 18. C. A. 1887 *April* 28, 29.

HALL *v.* BROMLEY.

[1885 H. 3131.]

Copyhold—Several Fines—Surrender—Appointment—Tenant—New Title—Second Admittance.

The lord of the manor is entitled to a fine in respect only of a transmission of the legal estate in copyholds, and cannot claim a fine in respect of any devolution of the equitable title where the legal estate remains in the person who has been already admitted tenant on the roll.

E., as customary heir of *M.*, was in 1848 admitted as tenant on the rolls of a manor, in respect of copyholds which by *M.'s* will the trustees thereof were directed to sell. The trustees contracted to sell the copyholds to *A.*, but before completion *A.* was married to *X.* Subsequently, in December, 1849, the copyholds were conveyed to the trustees of *A.'s* marriage settlement. *E.* joined in the conveyance and thereby covenanted to surrender to the uses of such settlement, and in pursuance of his covenant surrendered in May, 1850, to the use of such persons as the trustees of *A.'s* settlement should appoint. Upon the death of *X.*, *A.* became absolutely entitled to the copyholds, and by deed of 1853, which recited incorrectly that no surrender had been made by *E.*, the trustees of the settlement granted, bargained, and sold the copyholds to *A.*, and *E.* joined in this deed and covenanted to surrender to the use of *A.*

The surrender was not acted upon, and by a settlement of 1854 on the second marriage of *A.* with *Y.*, she purported to assign her equitable interest in the copyholds to *E.*, *F.*, and *G.* on trust for sale. *A.* died in 1856, leaving *E.*, who had remained tenant on the rolls, her customary heir. *E.* survived *F.* and *G.*, leaving executors on whom, under the *Conveyancing Act*, 1881, s. 30, his estate in the copyholds devolved; and they had been admitted.

Three fines were claimed by the lord: 1. In respect of the *quasi* admittance of *A.* as appointed under the deed of 1853; 2. In respect of the *quasi* admittance upon *A.'s* death of *E.*, as her customary heir; 3. In respect of the legal estate which devolved upon *E.'s* executors:—

Held, that the deed of 1853 was a mere assignment of the equitable

interest in the copyholds to *A.*, and could not be construed as operating by appointment to transfer the legal estate from *E.* to *A.*; and accordingly that as the legal estate of *E.*, the tenant on the roll, remained unaffected by the equitable devolutions of title, the only fine payable was in respect of the admittance of the statutory heirs of *E.*:—

Held, also, that a covenant for value to surrender, though binding as between surrenderor and surrenderee, cannot be enforced by the lord, so as to entitle him to compel a new admittance and a fine in respect thereof.

MARY HAMMOND was tenant of certain copyholds of the manor of *Thetford*, in the county of *Cambridge*, and by her will directed that the three trustees of her will should sell and dispose of her copyhold lands in the county of *Cambridge*, but the will contained no express devise of the copyholds. She died in October, 1847, and on the 25th of November, 1848, *Edward Hammond*, as her eldest son and customary heir, was admitted tenant of the copyholds. *Anna Hammond*, afterwards *Anna Dench*, contracted with the trustees of the will for the purchase of these copyholds; and by an indenture of settlement of the 10th July, 1848, made on her marriage with *James Dench* she assigned to trustees all the benefit of the contract for the purchase above mentioned; and it was declared that the copyholds should be assured to the trustees of the settlement on trusts for sale and investment, and on trust to pay the income to *Anna Dench* during her life, and (after her death) in case she should survive *James Dench*, and there should be no children of the marriage (which events happened) then upon trust for her absolutely.

By an indenture of the 21st of December, 1849 (referred to as the *Dench* conveyance), the trustees of *Mary Hammond's* will conveyed the copyholds to the trustees of *James* and *Anna Dench's* marriage settlement, and in and by this indenture *Edward Hammond*, a party thereto of the second part, covenanted to surrender the copyholds to the use of the *Dench* trustees upon the trusts of the settlement of the 10th of July, 1848. In pursuance of this covenant *Edward Hammond*, by an instrument in writing dated the 22nd of December, 1849, and presented and enrolled at a Court of the manor held on the 27th of May, 1850, surrendered the copyholds to the use of such person or persons as the trustees of the *Dench* settlement should by any deed or deeds appoint, and in default of any such appointment to the use of

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them their heirs and assigns upon the trusts declared by the settlement.

There had not been any admittance to the copyholds under or by virtue of this surrender.

James Dench died in 1852, leaving *Anna Dench* him surviving, but there were no children of the marriage. *Anna Dench* being, therefore, absolutely entitled to the proceeds of the sale of the copyholds declared her election to take them as land; and by an indenture of reconveyance, dated the 18th of March, 1853, after reciting (incorrectly) that no surrender of the copyholds had been made to the trustees of the *Dench* settlement, and that *Edward Hammond* was seised thereof upon the trusts of that settlement, it was witnessed that the trustees of that settlement thereby granted, bargained, and sold the said copyholds unto *Anna Dench*, her heirs and assigns. And *Edward Hammond* covenanted to surrender the same to the use of the said *Anna Dench*, her heirs and assigns, and that until such surrender he would stand seised of them in trust for *Anna Dench*, her heirs and assigns.

By an indenture of settlement, dated the 24th of January, 1854, and made previously to the marriage of *Anna Dench* with *A. Gilbert*, she granted, bargained, and sold to *Edward Hammond*, *John Hammond*, and *Robert Gilbert*, all her equitable estate, right, title, and interest of and in the said copyholds, to hold the same upon the trusts thereinafter declared of the same; and *Edward Hammond* covenanted to surrender to the use of those trustees.

Anna Gilbert (formerly *Anna Dench*) died in 1856, intestate as to copyholds, leaving *Edward Hammond* her heir-at-law and customary heir.

No surrender was ever made by *Edward Hammond* in pursuance of his covenants in the deeds of 1853 and 1854, and he remained tenant on the rolls from his admittance in 1848 until his death in March, 1884, having survived the two other trustees of the *Gilbert* settlement, and having appointed *J. R. Bromley* and *J. E. Hammond* his executors, on whom under the *Conveyancing and Law of Property Act*, 1881, s. 30, his estate in the copyholds devolved.

The property was put up for sale, as by order of his executors as trustees of the *Gilbert* settlement, and sold. On investigation

of the title, questions arose as to the persons to be admitted as vendors. These questions were under the *Vendor and Purchaser Act*, 1874, submitted to the decision of Vice-Chancellor *Bacon*, who by an order made on the 7th of February, 1885, declared that the proper persons to be admitted to the copyholds comprised in the instrument of the 22nd of December, 1849, were the executors and statutory heirs of *Edward Hammond*. They were accordingly admitted on the 13th of May, 1885.

The ladies of the manor brought this action against the executors of *Edward Hammond* and the purchaser, claiming three fines. (1.) In respect of the legal estate vested in *Anna Dench* as appointee under the reconveyance of 1853. (2.) In respect of the legal estate which became vested in *Edward Hammond* as her heir. (3.) One fine and a half in respect of the legal estate which vested in the executors of *Edward Hammond* on his death.

The Defendants admitted their liability to pay the fine on the death of *Edward Hammond*, but denied their liability to pay any other fines.

The action came on for hearing before Mr. Justice *Kekewich* on the 8th of December, 1886.

Barber, Q.C., and *Archibald Brown*, for the Plaintiffs:—

The reconveyance of 1853 operated as an appointment under the surrender and could have no other operation. The deed was otherwise useless, as there was no legal estate in the trustees. Mrs. *Dench* could at any time have come in and been admitted, and that is the legal devolution under the surrender. *Glass* v. *Richardson* (1) shews that such an appointment is effectual, and that the words "bargain and sale" are apt words. *Reg.* v. *Corbett* (2) shews that there must be a second admittance. In fact *Edward Hammond* must be taken as having surrendered to the use of Mrs. *Dench*: *Scriven* on Copyholds (3). A deed must be construed most favourably to the grantee: *Roach* v. *Wadham* (4). As Mrs. *Dench* was never admitted the inaccurate deed of 1854 only operated as an agreement by her that she would convey. The legal estate being in her passed to her heir, who, curiously,

(1) 2 D. M. & G. 658.
(2) 1 E. & B. 836.
(3) 6th Ed. p. 125.
(4) 6 East, 289.

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was the same *Edward Hammond*. But he or his devisees must be again admitted under the new title, and under 1 Vict. c. 26, s. 4, though there is no actual admittance, the fines and fees must be paid: *Sheppard* v. *Woodford* (1); *Doe* v. *Vernon* (2); *Rex* v. *Coggan* (3). Mrs. *Dench* was never admitted under the surrender, because there is no special custom in this manor to compel admittance, but that makes no difference as to the devolution.

Elton, Q.C., and *Challis*, for the Defendants:—

If there has been a surrender not followed by admittance the surrender remains dormant: *King* v. *Dilliston* (4). The Act of 55 Geo. 3, c. 192, made it unnecessary to surrender to the use of the will: *Watkins* on Copyholds (5). Then the question arose whether a surrenderee not admitted could devise, and in some cases it was held that he could, and in other cases that he could not: *Wainwright* v. *Elwell* (6). Then by the *Wills Act* the surrenderee was enabled to devise, but on payment of two fines as if he had been admitted. But here the estates are equitable only, and the surrenderee was under no obligation to act on the surrender. The lord had a tenant. The deed of 1853 was not intended to be and was not an exercise of the power of appointment: *Hughes* v. *Wells* (7). In *Boughton* v. *Sandilands* (8) there was a mistake: *Sugden* on Powers (9); *Brodrick* v. *Brown* (10); *Wildbore* v. *Gregory* (11). As to fines payable when an ancestor has not been admitted: *Right* v. *Banks* (12); *Doe* v. *Lawes* (13); *Garland* v. *Alston* (14). But assuming that we are wrong on this point, *Edward Hammond* was tenant and could not have another estate forced upon him in order to give the lord a right to fines. A man cannot be made to take an estate which he already has—not an estate of a different kind, but the very same estate.

Barber, in reply:—

The title is made through Mrs. *Gilbert*, and must come through

(1) 5 M. & W. 608.
(2) 7 East, 8.
(3) 6 East, 431.
(4) 3 Mod. 221.
(5) 4th Ed. vol. i. p. 126.
(6) 1 Watk. Cop. 4th Ed. p. 125, n.
(7) 9 Hare, 749.
(8) 3 Taunt. 342.
(9) 7th Ed. vol. i. p. 423.
(10) 1 K. & J. 328.
(11) Law Rep. 12 Eq. 482.
(12) 3 B. & Ad. 664.
(13) 7 Ad. & E. 195.
(14) 3 H. & N. 390.

her heir. That is the position taken up by the vendors, and they must abide by it. Mrs. *Gilbert's* trustees are selling, and how else can they have a right to sell. The Vice-Chancellor *Bacon* has decided that they are to be admitted, and they must pay the fines accordingly. Mrs. *Gilbert*, then Mrs. *Dench*, in 1853 elected to take the lands. Suppose that Mrs. *Dench* had then sold, surely she must have been first admitted. *Edward Hammond* was *functus officio*, and she stood in his place.

[KEKEWICH, J.:—Could she have made a title unless an appointment to her had been made.]

It was not strictly a power of appointment, but a power of nomination, and after the deed of 1853 no one but Mrs. *Dench* could have been admitted. Though the deed does not in terms refer to the surrender it will still have its legal effect. *Boughton* v. *Sandilands* (1) is very different. She was absolute owner. The other deeds purport to deal with the equitable interest only: *Lord Londesborough* v. *Foster* (2) is exactly like this case. If her heir had been any one but *Edward Hammond*, clearly her heir must have come to be admitted. *Reg.* v. *Corbett* (3) is a clear authority, and did not in principle depend on any special custom. In *Sheppard* v. *Woodford* (4) two fines were paid. As to the effect of the *Conveyancing Act* on trust estates the draftsman probably had not copyholds in view. When sect. 3 of the *Wills Act* extended the power of devising it provided for the payment of two fines.

Elton, in reply, on Lord *Londesborough* v. *Foster*:—

In that case a special custom was proved, and it is not easy to see why they came to the Court.

1886. Dec. 18. KEKEWICH, J.:—

I reserved judgment in this case for the purpose of considering some of the many authorities cited. Notwithstanding the complications which seem to be inseparable from questions of this character, the prominent facts necessary for explaining my judg-

(1) 3 Taunt. 342.
(2) 9 Jur. (N.S.) 1173.
(3) 1 E. & B. 836.
(4) 5 M. & W. 608.

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ment may be shortly stated. [His Lordship then stated the facts of the case and the claims of the Plaintiffs to the three fines, and proceeded :—]

The claim to the first fine depends on the effect to be given to the conveyance of the 18th of March, 1853. It is said, on the one hand, that this conveyance operated, whether so intended or not, as an exercise of the power of appointment given to the trustees of the *Dench* marriage settlement by *Edward Hammond's* surrender, and therefore passed a legal interest to Mrs. *Dench* entitling her to be admitted pursuant to such surrender. On the other hand, it is said that the conveyance operated merely as a dissolution of the relations existing between the trustees and Mrs. *Dench*, their only *cestui que trust*, and as a conveyance by them to her of such estate as was vested in them as trustees. It is admitted that the words "bargain and sale," which occur in the operative part of the deed, are apt words of appointment under the surrender, that is, are sufficient to make the deed take effect as an appointment under that surrender if in other respects that is the proper effect to be attributed to it. That is the real question between the parties. I was referred to *Brodrick* v. *Brown* (1), as laying down the rules by which the Court ought to be guided in determining whether a given instrument ought or ought not to be treated as an exercise of the power of appointment. I am not sure that some important distinctions may not be drawn between a power of appointment, properly so called, that is a power of appointment over property, and a power of nomination such as is contained in the surrender in question, which, be it observed, could only be exercised strictly in accordance with the terms of the settlement of which the donors are trustees. Accepting, however, the case of *Brodrick* v. *Brown* as a guide, I find, as might be expected, that the Vice-Chancellor states this rule as paramount to all others: "The Court always endeavours in such cases to carry the intention into effect, so far as such intention can be gathered from the instrument itself." I turn, therefore, to the instrument, and I find it expressed in such language as clearly to indicate that the parties intended it to operate merely as a conveyance, and not as an exercise of a

(1) 1 K. & J. 328, 332.

power. They were unaware of the surrender, and the deed recites that no surrender had been made by *Edward Hammond* pursuant to his covenant, and consistently with this *Edward Hammond* thereby covenants to surrender to the use of Mrs. *Dench*, her heirs and assigns. There could be no better proof of the intention of the parties. Two subsidiary arguments were put forward—first, that a deed must be construed *ut res magis valeat quam pereat*, and, secondly, that immediately after the execution of the deed Mrs. *Dench* could have insisted on being admitted. As regards the second of these arguments, suffice it to say that it is only a statement of the principal argument in another form, for she could not have insisted on being admitted unless the deed operated as an exercise of the power; and as regards the first, the deed has operated and will operate to pass the property to Mrs. *Dench* as was intended, and therefore the maxim has no application. I do not think it necessary to mention in detail *Glass* v. *Richardson* (1) and the other cases on this point. They bear more directly on the question how a title could properly be made through an appointment under the surrender rather than on the question whether the deed of the 18th of March, 1853, ought to be regarded as such an appointment.

Having decided against the Plaintiffs on their claim to the first fine, it is really unnecessary for me to determine whether the second claim is good. For, if the deed of the 18th of March, 1853, had not the effect sought to be attributed to it, Mrs. *Gilbert* had no legal estate which could descend to her customary heir, and the claim to the second fine also fails.

It will, however, be convenient, after the full argument of this point, that I should express my opinion upon it. For this purpose I must, of course, assume that the estate which descended on *Edward Hammond* was in fact a legal estate. It was strenuously argued that, although *Edward Hammond* was, before the death of Mrs. *Gilbert*, tenant on the roll, he having been admitted as the heir of *Mary Hammond*, yet, by reason of the new title vested in him as heir of Mrs. *Gilbert*, he would necessarily be admitted again, and that on that admission a fine would be payable. In support of this contention many authorities were cited,

(1) 2 D. M. & G. 658.

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and I must refer to one or two of them. That most relied on was *Reg.* v. *Corbett* (1). A careful examination of that case proves that it turned entirely on the unusual custom there found to exist by which, pending a sale of copyholds by devisees in trust for sale, the lord could be compelled to admit any person, though a complete stranger. This, in my opinion, destroys the authority which that case might otherwise possess with reference to the one now under consideration. Another case relied on, and more useful because more illustrative of a principle, was *Sheppard* v. *Woodford* (2). There, on the admission of two new trustees jointly with a surviving trustee, and on his surrender, it was held that there was an admission of three to a new estate, and that the fine payable must be calculated on that basis. This is in accordance with the familiar rules respecting the creation of a joint tenancy, and it is obvious that these rules formed the basis of the judgment. Lord *Abinger* says (3): "But it is contended that, inasmuch as one of the surrenderors is also a surrenderee in this case, the admission must be treated as the admission of only two instead of three joint tenants. But what is the fine due for? Plainly in respect of the admission to the new estate. And here the party who surrenders takes with the other two a new estate by the admittance of the lord." *Edward Hammond* did not take and could not take a new estate. He was tenant on the roll, not on his own behalf, but as trustee for others, and, though the trusts were varied, and according to the argument he might be said to have held the estate in a new character, the estate remained the same. This fact—namely, that *Edward Hammond* was himself the tenant on the roll—also distinguishes this case from others cited, such as *Lord Londesborough* v. *Foster* (4) and *Doe* v. *Vernon* (5), so as to render them inapplicable to the matter in hand, and I say no more about them. Nor do I think it necessary to comment on the provisions of the *Wills Act* (1 Vict. c. 26, ss. 3, 4), more than to say that, while enlarging the power of devising copyholds and protecting the rights of lords, they do not purport to extend their rights, and cannot

(1) 1 E. & B. 836.
(2) 5 M. & W. 608.
(3) Ibid. 617.
(4) 3 B. & S. 805, cited from 9 Jur. (N.S.) 1173.
(5) 7 East, 8.

be construed to make payable fines which but for the Act would not have been paid. The 30th section of the *Conveyancing Act*, 1881, which has been construed to include copyholds, has seriously altered the law of descent, or perhaps one should say of devolution; but of course it cannot be taken to impose on those becoming heirs or devisees by virtue of the statute any liability not previously falling on those who were in truth heirs or devisees.

There must, therefore, be a declaration that the Plaintiffs are entitled to one fine only—namely, the third claimed by them—and that it is to be assessed in the manner in which, according to the admissions in the pleadings, it ought to be assessed. If the Plaintiffs cannot agree, the assessment must be made in Chambers or by a referee. This fine, whether agreed on or otherwise assessed, will be payable in exchange for the admission which has been retained by the lord. I do not think that it would be right to make any order for payment. The whole contest has been about the first and second fines, and, holding as I do that the Plaintiffs have not established their right to either of them, I must order them to pay the costs of the Defendants *Bromley* and *Hammond*. The Defendant *Hall* will neither pay nor receive costs.

C. M.

C. A.

From this judgment the Plaintiffs appealed. The appeal came on for hearing on the 28th of April, 1887.

Barber, Q.C., and *Archibald Brown*, in support of the appeal.

Elton, Q.C., and *Challis*, for the Respondents, were not called on.

The argument was in substance the same as that urged on behalf of the Plaintiffs in the Court below. The only additional cases were *Right* v. *Banks* (1) and *Bristow* v. *Booth* (2) (referred to by Lord Justice *Cotton*).

COTTON, L.J.:—

The question in this case as between the ladies of the manor and the customary heirs of *Edward Hammond*, who, in pursuance of

(1) 3 B. & Ad. 664. (2) Law Rep. 5 C. P. 80.

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an order of Vice-Chancellor *Bacon*, have been admitted as tenants and paid one fine on admittance, is, whether they ought to pay more than one fine. The purchasers must consider not only whether a good legal and equitable title on the rolls is shewn by the vendors, but they must also see that all persons who have an equitable interest in the property concur in or authorize the sale. The lord, however, has nothing to do with the equitable title, but is only concerned to see who is entitled to be on the rolls as tenant, and what fine or fines ought to be paid.

On the death of the original testatrix *Edward Hammond* was admitted as her customary heir, and continued on the rolls until his death. The will contained a power of sale, and the trustees, in exercise of this power, contracted to sell the copyholds in question to *Anna Dench*, and, at her request, by deed of the 21st of December, 1849, conveyed them to the trustees of her marriage settlement on trusts for sale, and to hold the proceeds upon the trusts therein mentioned.

Edward Hammond, who was a party to that deed, thereby covenanted to surrender the copyholds to the use of such persons as *Anna Dench's* trustees should by deed or deeds appoint, and, in default of such appointment, to the use of such trustees, their heirs and assigns, upon the trusts of the settlement; and in pursuance of his covenant *Edward Hammond* executed a surrender by which he purported to surrender the copyholds to such uses as *Anna Dench's* trustees should appoint, and in default of appointment to the trustees, their heirs and assigns, upon the trusts of the settlement. That surrender was never acted upon, and no one was admitted under it, and *Edward Hammond* remained tenant on the rolls.

The trusts of the settlement having come to an end in 1853 by the death of *James Dench* without issue, the trustees of it granted, bargained and sold the copyholds to *Anna Dench* absolutely, and the deed contained an erroneous recital that no surrender had been made by *Edward Hammond*.

On the subsequent marriage of *Anna Dench* to *Arthur Gilbert*, a marriage settlement was executed, by which she purported to deal with her equitable interest in the copyholds. She died in 1856, and *Edward Hammond* then became entitled to the copyholds as

her customary heir. Upon his death in March, 1884, his statutory heirs have been admitted, and it is contended on behalf of the lord of the manor that he is entitled to two additional fines, on the ground (1) of the *quasi* admittance of *Anna Dench* under the deed of March, 1853, and (2) of the *quasi* admittance upon her death of *Edward Hammond* as her customary heir. In my opinion that contention is entirely wrong. It is said that the contention is supported by the order of Vice-Chancellor *Bacon* of the 7th of February, 1885. But when the Vice-Chancellor made that order he was not dealing with any claims of the lord of the manor; and all that he decided was, that the executors and statutory heirs of *Edward Hammond*, who was the last tenant on the roll, were the proper persons to be admitted to the copyholds.

As to the surrender of May, 1850, those who had the right to insist upon it did not do so, but were willing to give up their right. Then it has been contended that the instrument of 1853 operated as an appointment under the settlement of 1849 to the uses to which the surrender was to be made. But even if it was an appointment to uses, I very much doubt whether the lord could have insisted on enforcing any admission in accordance with that surrender. I do not, however, think that the deed of 1853 purported to be an appointment to the uses of the surrender; for instead of referring to the surrender by *Edward Hammond*, as it would have done if it had been an appointment in furtherance of the object of that surrender, it contains a recital that there had been no surrender. I think the true construction of that deed is that it put an end to the trusts of the settlement of 1849 by assigning the equitable interest in the copyholds to *Anna Dench*; but *Edward Hammond* remained tenant on the rolls, as trustee it may be for *Anna Dench*, and for any person to whom she might assign her equitable interest. Purchasers from *Anna Dench* or her nominee were entitled to call on *Edward Hammond* while living, and after his death on his representatives, to allow them to be admitted. No doubt a covenant for value to surrender is binding, and the surrenderor is thereby concluded at law, that is to say, as between him and the surrenderee, he cannot withdraw from it. But that does not affect the lord, and

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he cannot enforce it, since the surrenderor and surrenderee can by agreement exclude the necessity for admittance, and leave the surrenderor on the roll as trustee. Of course, it is different where the title depends on admittance, but that is not the case here, there being no necessity of making out any title except to *Edward Hammond*, who was admitted tenant on the rolls and remained such until his death.

Various cases have been referred to in support of the contention of the Appellants, and *Reg.* v. *Corbett* (1) was especially relied on. In that case, however, there was a special custom of the manor that until a power of appointment by will was exercised a tenant might claim admittance, and as soon as the power of appointment was exercised the interest of the person admitted came to an end, and the appointee was entitled at once to claim to be put upon the roll under his new title. That case, therefore, was very different from the present.

Sheppard v. *Woodford* (2) hardly assists the Appellants. In that case there were three trustees originally upon the roll; one died, another declined to act, and the third surrendered to himself and two new trustees; and it was held, and in my opinion rightly held, that a fine was payable as upon the admission *de novo* of three tenants as joint tenants; "the party who surrenders takes with the other two a new estate by the admittance of the lord:" see *per* Lord *Abinger*, C.B. (3). In *Lord Londesborough* v. *Foster* (4) copyholds were devised to trustees in fee, and the trustees were never admitted, but some of the beneficiaries had been admitted, though without any right to such admittance. On the death of the surviving trustee his customary heir claimed admittance, and it was held that the lord was entitled to two fines; one for the admission of the customary heir, and the other as if his father had been admitted. All these cases are clearly distinguishable, and in my opinion the appeal fails, and must be dismissed with costs.

SIR JAMES HANNEN:—

I agree, and have nothing to add.

(1) 1 E. & B. 836.
(2) 5 M. & W. 608.
(3) 5 M. & W. 617.
(4) 9 Jur. (N.S.) 1173.

LINDLEY, L.J. :—

If the case had not been so elaborately argued I should have thought that it was quite incapable of argument. An attempt has been made to link together the equitable and legal interest. The real key to the question is that, as a general rule, there is no fine payable except in the case of admittance. There are, of course, exceptions to that general rule, but it is not necessary to refer to them in reference to this case. Admittance and the right to admittance depend upon the legal estate, and the lord can look at that only, and has nothing to do with any equitable devolution of title. In this case the legal title to the copyholds has been in *Edward Hammond* throughout, and on his death it devolved upon his statutory heirs. They applied to the lord to be admitted, and a fine was payable on their admittance. If they were not equitably entitled they would be trustees for the beneficiaries, but what has the lord to do with that. The legal title would be complete, and that is all the lord is concerned with. The case in my opinion is as clear as any copyhold case can be, and the appeal must be dismissed.

Solicitors: *Richard Furber ; Aldridge, Thorn & Morris,* agents for *Fenn, D'Albani & Ellis, Newmarket.*

F. G. A. W.

C. A.
1887
May 4, 5.

In re LANCASHIRE COTTON SPINNING COMPANY. *Ex parte* CARNELLEY.

Company—Winding-up—Distress for Rent accrued after Winding-up Order—Mortgage with Attornment Clause—Companies Act, 1862, *ss.* 87, 163 [*Revised Ed. Statutes, vol. xiv., pp.* 222, 238.]

A limited company mortgaged certain cotton mills, machinery, and fixtures for £22,000. The mortgage deed contained a clause by which the company attorned tenants to the mortgagees at an annual rent of £1595.

The company was ordered to be wound up, and the official liquidator remained in possession of the mills for more than a year in order that he might, if possible, sell them as a going concern. He paid the expenses of keeping the premises and the machinery in repair, but did not actually work the mills. The mortgagees acquiesced in this arrangement, believing it to be the best for all parties. The mortgagees then applied for leave to distrain for a year's rent accrued since the winding-up order:—

Held (affirming the decision of *North*, J.), that as it appeared from the evidence that the occupation of the liquidator was for the benefit of the mortgagees as well as of the company, the mortgagees ought not to be allowed to distrain.

In re Exhall Coal Mining Company (1) disapproved but followed.

When a landlord applies to the Court for leave to distrain for rent upon the goods of a company which is being wound up, he must shew either that there are special circumstances rendering it inequitable for the 163rd section to be enforced against him; or that the rent has accrued under such circumstances that it ought to be paid as part of the costs of the winding-up.

Semble, a mortgagee with an attornment clause who asks for leave to distrain for his interest after a winding-up order, is in a more unfavourable position than a landlord who asks for leave to distrain for rent.

THIS was an appeal from an order made by Mr. Justice *North* in Chambers.

By an indenture of mortgage dated the 28th of October, 1878, between the *Lancashire Cotton Spinning Company, Limited*, and *R. Whittaker*, the company conveyed certain cotton mills at *Royton*, in the county of *Lancashire*, and the warehouses and buildings held therewith, to *R. Whittaker* in fee simple, and assigned to him the machinery and fixtures therein by way of mortgage for securing the repayment of £22,000, with interest at 6 per cent. The indenture contained a clause in which the

(1) 4 D. J. & S. 377.

company attorned tenants from year to year of *R. Whittaker*, his heirs, executors, administrators, and assigns, for the hereditaments and premises thereby granted and assigned, so as to be at the yearly rent of £1595, by half-yearly payments on the 30th of June and the 31st of December in each year, with full power to him or them to distrain upon the chattels found upon the premises if the said yearly rent should be in arrear, and to enter upon and take possession of the hereditaments and premises, and to determine the tenancy created by the aforesaid attornment.

The mortgage was transferred by *Whittaker* to *J. Clegg*. He died on the 23rd of June, 1885, having by his will appointed *W. Carnelley* and three other persons his executors.

A petition having been presented on the 14th of November, 1885, to wind up the company, a winding-up order was made and an official liquidator was appointed. At that time half a year's interest was due on the mortgage, and since the commencement of the winding-up another year's rent had become due.

The official liquidator had endeavoured to sell the mills and machinery as a going concern, and for that purpose had kept the mills and machinery in repair and working order.

The executors of *J. Clegg* stated that they had abstained from seeking to enforce the powers and remedies given by the mortgage security in the hope and expectation that by the sale of the premises as a going concern the liquidator would be able to realize a substantial surplus for the unsecured creditors of the company. The liquidator, however, stated in his affidavit that he had retained possession of the premises more for the benefit of the mortgagees than of the creditors; that he had paid the expenses of keeping the premises in repair and the machinery in working order, and paying the rates and insurance, hoping to sell them as a going concern, but that the mills had not been actually worked; and that the mortgagees had never applied to him to pay the interest due to them or threatened to distrain for it.

It also appeared from the evidence that the mortgagees were themselves shareholders in the company, and that they were desirous of getting up a new company, which should purchase the mills and machinery. But this proposal was found to be impracticable.

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On the 2nd of March, 1887, the liquidator gave notice to the mortgagees that he intended to dispose of the moveable machinery and effects after fourteen days unless the mortgagees should distrain in the meantime.

The mortgagees then applied to Mr. Justice *North* in Chambers for leave to exercise their power of distress for one year's rent under the terms of the attornment clause in the mortgage. His Lordship refused the application, and the mortgagees appealed from his decision.

Buckley, Q.C., and *W. P. Beale*, for the Appellants:—

The interest was paid up to the half-yearly day of payment before the winding-up. We ask for leave to distrain for what has since accrued. As between a company and its landlord the law is clear—he can only prove for rent accrued before the winding-up. As to subsequent rent the question is whether the company has retained possession for its own purposes: if it has, the rent must be paid in full. If, on the other hand, the liquidator has done his best to get rid of the lease, and offered to surrender it, the landlord can only prove for the rent. The case of a mortgagee is not quite the same, for a landlord is not a secured creditor. But where a mortgagee bargains for a right of distress as part of his security the Court will not deprive him of the benefit of it, and if not in the position of a landlord, which he appears to have been held to be in *Ex parte Voisey* (1), he is in a better position. Mr. Justice *North* thought that the occupation here was for the joint benefit of the estate and of the mortgagees, and that *In re Bridgewater Engineering Company* (2) governed the case. We say that he came to a wrong conclusion on the evidence, and that there was no request by the mortgagees to the liquidator to do anything. They only shewed forbearance. You do not expect a mortgagee to ask for possession, as he thereby burdens himself with the heavy liabilities of a mortgagee in possession. We say that here the liquidator retained possession because he thought he could dispose of the property more advantageously than by renouncing it. The law on the subject is summed up in the judgment of Lord Justice *Lindley* in *In re Oak Pits Colliery Company* (3). The cases

(1) 21 Ch. D. 442. (2) 12 Ch. D. 181. (3) 21 Ch. D. 322.

most in favour of the Respondents are *In re Progress Assurance Company* (1) and *In re Bridgewater Engineering Company* (2). But these cases do not go nearly as far as is necessary for the purpose of the Respondents. In the latter of them Vice-Chancellor *Hall* states the law as we have put it, and came to the conclusion of fact that there had not been an occupation for the purposes of the company but for the joint accommodation of the landlord and the tenants. In *In re North Yorkshire Iron Company* (3) the landlords were allowed to distrain, the company having retained possession with a view to selling. *In re Lundy Granite Company* (4) is to the like effect. In *In re Brown, Bayley and Dixon* (5) the principle was laid down that as to interest accrued since the winding-up the mortgagee with a power of distress is in the position of any other person having a contract, and that effect must be given to that contract. A case will be excluded from the operation of this rule where there has been an arrangement such as in the case of *In re Progress Assurance Company*. In the case of *In re Oak Pits Colliery Company* (6) the liquidator had never been in possession, and the landlord had no case, unless he could prove something which amounted in equity to taking possession.

[COTTON, L.J.:—Where the company is lessee, if the liquidator does not offer to surrender, he may be presumed to be retaining possession for the purposes of the company. The case of mortgagor and mortgagee is different.]

The liquidator might surrender his tenancy under the attornment clause, just as any other tenancy can be surrendered. The mortgagees were asked to hold their hand, that the liquidator might have time to sell advantageously, and a contract is to be implied that while they did so rent would be paid. The Court will not deprive us of the benefit of the power of distress for an arrear of rent which has been running up while the company retained possession for its own purposes.

(1) Law Rep. 9 Eq. 370.
(2) 12 Ch. D. 181.
(3) 7 Ch. D. 661.
(4) Law Rep. 6 Ch. 462.
(5) 18 Ch. D. 649.
(6) 21 Ch. D. 322.

C. A. 1887

In re LANCASHIRE COTTON SPINNING COMPANY. *Ex parte* CARNELLEY.

Napier Higgins, Q.C., and *Chadwyck Healey*, for the liquidator:—

Under sect. 163 of the *Companies Act*, 1862, standing alone, every distress after the winding-up would be void. The Court came to the conclusion that sect. 163 must be read along with sect. 87, and that a distress with the leave of the Court would be good. But when will the Court give leave? If the argument for the Appellants is sound, every company may contract itself out of sect. 163. Besides *In re Progress Assurance Company* (1) and *In re Bridgewater Engineering Company* (2), the observation in *In re Lundy Granite Company* (3), that leave is given where the company for its own purposes retains possession of the estate, "which the lessor is therefore not able to obtain possession of," makes strongly in our favour. In *In re Oak Pits Colliery Company* (4) it is said that the burden is on the landlord to shew why he should have an advantage over other creditors, and that no case has gone the length of saying that rent is to be paid in full where the liquidator has done nothing except abstaining from trying to get rid of the property. We say, then, that even if the company were an ordinary tenant, the landlord ought not to have leave to distrain. To pass, then, to the case of mortgagor and mortgagee, it is a bold position that a mortgagee with a power of distress is in a better position than an ordinary landlord. We say he is not in so good a one. It is said why does not the company give up possession like another tenant? The liquidator would be most happy to do so if he could do so with the same results as in the case of an ordinary tenancy, *i.e.*, get rid of the contract altogether. But the mortgagee will not give up his mortgage; the contract remains. You cannot strike out the attornment clause. It is a novel idea that a company in course of winding up must pay interest in full as long as the principal remains unpaid.

Buckley, in reply.

(1) Law Rep. 9 Eq. 370.
(2) 12 Ch. D. 181.
(3) Law Rep. 6 Ch. 462.
(4) 21 Ch. D. 322.

COTTON, L.J.:—

This is an application by way of appeal for liberty for the mortgagees, who have an attornment clause and claim to have the right of a landlord, to distrain unless the liquidator pays them the rent which has accrued since the commencement of the winding-up. The application is very properly limited to that.

Now, sect. 163 of the Act of 1862, if it stood by itself, and I may also say, in the absence of decisions, would have been conclusive against the application, because that section, as I understand it, is clear. It is this: "Where any company is being wound up by the Court or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." That seems a very clear section, and that is the great difficulty, notwithstanding another section and decisions upon it, in the way of the Applicants.

But it has been decided that that section must be read subject to the provisions of sect. 87, which says that "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose." Undoubtedly Lord Justice *Turner* in *In re Exhall Coal Mining Company* (1), said that you must read those two together, notwithstanding the precise words of sect. 163; and that the Court had power to authorize a distress, which came within the word "proceeding" in sect. 87. To my mind, it is doubtful, whether, having regard to the express words of sect. 163, which says, "That any distress shall be void," it was right to say that sect. 87 included distress among the "proceedings" which the Court might allow. There are other proceedings in the nature of actions and modes of enforcing claims against the company which undoubtedly would satisfy sect. 87 without including in the word "proceeding" a distress, which is in terms dealt with under sect. 163.

(1) 4 D. J. & S. 377.

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But it would be wrong for us to depart from the decisions which have followed that judgment of Lord Justice *Turner* in *In re Exhall Coal Mining Company* (1) as long ago as 1864, and following those decisions we have to consider what is the rule which has been laid down not inconsistent with those cases. It is this, that it lies upon the landlord, who applies to put in a distress, to shew that there are circumstances which justify the Court in depriving the company and the creditors of the company of the benefit of the express provision of sect. 163. The question, therefore, is whether that has been done in the present case. It is unfortunate, perhaps, that a good many of the cases on these two sections, and on applications like this, have not dealt with the matter as directly as they might have done. In one authority which has been referred to, *In re Lundy Granite Company* (2), the question really did not arise, and it was only some general observations of Lord Justice *James*, which, with all respect, were not applicable to the case before him, which are relied on as laying down what the doctrine is. We have had cases cited where retaining possession as against the landlord was for the benefit of the company, and in those cases the Court has allowed the landlord to exercise his right of distress. Then there have been cases where it has been for the joint benefit, and there it has been said that the landlord cannot, under those circumstances, exercise his right of distress. There are other cases, probably, where it has been held that the working, or the possession, being beneficial for the winding-up of the company the rent has been considered as part of the expenses of winding up.

What principle are we to say underlies these cases? In my opinion the landlord coming to ask the Court to exercise the power which according to the decisions has been given by sect. 87 must shew one of two things, either that it is inequitable for the company or its liquidator to insist on sect. 163—that there is some special equity which entitles the landlord to ask the Court to relieve him of the burden of sect. 163—or that it is a case in which the Court will allow distress to be put in so as to recover the rent which ought to be paid as one of the expenses of winding up. But the matter must be brought within one or the other

(1) 4 D. J. & S. 377. (2) Law Rep. 6 Ch. 462.

of those heads in order to justify the Court in disregarding the express provisions of sect. 163, which in terms are clear.

Now what is there here? The Judge below decided this case on the ground that what had been done had been done for the joint benefit of the company and the mortgagee. I in no way differ from him, and I think probably he was right in coming to that conclusion. It is very true that the liquidator delayed selling in order to get a better price and in the hope that he would get something after paying the mortgagees. That looks as if the delay in selling was for the benefit, not of the mortgagees in any way coming here as landlords, but for the benefit of the company. But we must remember what the position of the mortgagees was. They were executors and were very largely interested in this company, one of them in his own right and all of them in respect of shares which had belonged to the testator. They were anxious to get up a new company, and one of the objects of postponing the sale was to do what was necessary in order to start a new company in which one of the executors was to take a very large share. So that the mortgagees delayed to exercise their power of sale as mortgagees in order to enable that to take place which was for the benefit not only of the company but of themselves who were interested in the company. I do not think the Judge was wrong in the conclusion which he arrived at, and it cannot in my opinion be considered as in any way inequitable for the company on behalf of its creditors to insist on the provisions of sect. 163; and, in my opinion, there is nothing which would justify us in dealing with the interest payable to the mortgagees as part of the expenses of winding up this company, when that interest accrued under the circumstances to which I have referred.

I have dealt with this case as if it were the case of a landlord coming here in respect of rent due to him for the enjoyment of the land by the company; but I cannot think that the mortgagee stands in as good a position as a landlord would. If a landlord were minded to take possession and could do so he would be free to deal with the property as he might think fit. But a mortgagee would stand in a different position. If he takes possession he puts himself into that very awkward position of being mortgagee

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in possession subject to accounts, and also with the liability of taking charge of the machinery and spending a considerable sum for the purpose of protecting it. I cannot think that here, if the mortgagees had not assented to what was done they would have taken possession, and I doubt whether it would be right to allow rent to be paid or to allow distress to be put in for rent when the effect of the payment of the rent would be, not to prevent the mortgagee from taking possession, but to prevent him from exercising an entirely different right, namely, the right of selling. It is not necessary in the present case to decide that, but I must express my opinion that a mortgagee who has this attornment clause and asks for liberty to distrain under it, does not come in as favourable a way as a landlord, whose right would be to take the land and deal with it as he thought fit, whether he exercises his power of taking possession or receives possession of it from the liquidator. This appeal therefore fails, and must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. In dealing with the cases on this subject, which are numerous and not altogether consistent, the cardinal point is not to lose sight of the provisions nor of the object of the Act of Parliament. The Court certainly did, in 1864, shortly after this Act passed, put a construction on sect. 87 which I think was a little forced. Notwithstanding the peremptory words of sect. 163, that no distress or execution shall be levied against the assets of the company, the Court held that sect. 87 gave the Court a power to allow such execution and distress to issue. I think that construction was rather forced; but I accept it. It has now been followed so often that the construction of the two sections which Lord Justice *Turner* was the first to put on them must now be adopted; nevertheless we must fall back on the sections, and see on what grounds a person who asks to be allowed to issue a distress or execution can escape from the peremptory provision contained in sect. 163. That there are circumstances which may entitle him to do so is conceded, having regard to the construction which has been put on the section; but the burden is always on him who wishes to issue

execution to shew why he should be entitled to do it. This rule has not been lost sight of in modern cases, even if it was a little at first.

Now what are the grounds on which these mortgagees rely for liberty to do that which is forbidden? Have they been induced to do anything by the liquidator which renders it inequitable for the company, through him, to protect themselves or to protect the creditors, it being a creditor's question more than a shareholder's question, by insisting on the application of sect. 163? Has anything happened which renders it unjust to give effect to that section? If there is, I conceive, upon authority and upon principle, that that section would not apply. I cannot see anything here which approaches such a case as that. I cannot say that the mortgagees here have been induced by anything said or done or omitted to be done by the liquidator to alter their rights. It is said by Mr. *Buckley* that the liquidator has bought delay, and must pay for it. But I am satisfied from the evidence that the mortgagees waited as much for their own benefit as for the benefit of the liquidator. They were interested in getting up this new company, and it was for their advantage that the liquidator should do his best, and have reasonable time to do it; and I cannot think, under those circumstances, that there is the slightest ground for saying there has been anything which renders it unjust on the part of the company to claim the benefit of sect. 163.

The only other ground which the mortgagees could suggest was that this rent ought to be paid as part of the costs of the winding-up. That is another ground altogether. If the liquidator on behalf of the company continues to carry on the business of the company, all costs, charges, and expenses properly incurred must be paid, notwithstanding sect. 163, which really has nothing to do with a question of that kind. But I do not think this case is brought within that principle; I agree with the reasons given by Lord Justice *Cotton*. It appears to me that the whole of the delay has been quite as much in the interests of the mortgagees as in the interests of the company. I think the decision of Mr. Justice *North* was right, and that the appeal must be dismissed with costs.

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BOWEN, L.J.:—

I am of the same opinion. The difficulty seems to arise very much from the construction that was put twenty-three years ago upon sect. 87. Sect. 163 is precise that any distress put in shall be void. Sect. 87, which is a distinct section, says that, "no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose." Now if it stood alone, apart from decisions, I should have the greatest possible difficulty in seeing how a distress could be a proceeding under sect. 87. The language would lead one to a different conclusion, and the fact that distress is forbidden by sect. 163 would drive one still further. But the opposite view has been taken by the Courts, and it would be, not only wrong, but I think it would be a monstrous disregard of authorities of the past if we were to try to be wiser than the Courts have been for twenty-three years. We must therefore do the best we can to harmonise these two sections, difficult as it is, for me in particular, and I think for the other members of the Court, to do it. It seems to me the true principle to be applied is that which Mr. *Chadwyck Healey* has urged on us, that it must rest on the landlord to shew why he should escape from the fetters of sect. 163, and should be afforded that leave which we will assume, in accordance with the decisions, can be granted to him in proper cases under sect. 87. I do not see how in reason there can be any except two principles upon which such leave can be granted to escape from the fetter imposed by statute. It seems to me the first inquiry must be whether anything has happened since the winding-up which renders it inequitable that the company in possession should be allowed to shelter itself against distress by virtue of the statute; or, if that inquiry results in a negative answer, and there is nothing to shew it is inequitable that the company should be sheltered by sect. 163, the next inquiry must be, has anything happened which renders the rent in respect of distress properly chargeable among the costs, charges, and expenses of the winding-up. If so, the rent ought to be paid, and it may well be that the Court ought to

allow the landlord to distrain as one of the natural means of obtaining his rent.

In applying those two principles the Courts have dealt in many instances, which it is not necessary to review, with the case where the occupation was retained by the company after the winding-up for the benefit of the company, or for the joint benefit of the landlord and the company, in such a way as to create, what I think Vice-Chancellor *Hall* called, a sort of mixed occupation. Those cases seem to me to be applications of one or other of the two principles which I have mentioned, and it is true that in applying them the Courts have not always put on paper the two principles and applied them *eo nomine*. But, whenever there has been a decision upon that class of case, the decision can only be justified and rendered intelligible by referring to one or other of those two principles.

Dealing with the present case and taking these two principles *seriatim*, we have first to see whether there is anything here which renders it inequitable that the company should be allowed to shelter itself against distress by sect. 163. I cannot see that the landlord's position has been altered for the worse by anything that has been done. It seems to me the Judge below was right in thinking it was for the mutual benefit of the company and the landlord that time should be given to the company, and I do not think that the time can be said to have been purchased, as Mr. *Buckley* puts it. I think it was a concession of time for mutual convenience, and that it was no part of the terms by which that time should be purchased that rent should be payable and distress put in. There was an attempt being made to form a company.

If that is so as to the first principle, I think it also follows that the second principle does not apply, and that the rent cannot be considered as one of the expenses of the winding-up, and that for that reason the distress ought not to be enforced.

It also seems to me that what Lord Justice *Cotton* has said deserves the greatest attention, though it is not necessary to discuss it further, namely, that it does not follow that a mortgagee is in the same position as a landlord. I think as soon as you arrive at the two principles which the Lord Justices and I have

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endeavoured to expound, the decision in every case becomes a question of fact, whether the circumstances of the case justify the application of the principle in favour of the landlord or in favour of the company, and the decisions with regard to benefit or mixed benefit appear to be decisions in the nature of mixed law and fact, as to the application of the two principles I have named.

Solicitors: *Field, Roscoe & Co.*, agents for *Wrigley & Claydon, Oldham; Gregory, Rowcliffes & Co.*, agents for *A. & G. W. Fox, Manchester.*

M. W.

C. A. 1887 NORTH, J. *Feb.* 8. C. A. *May* 13.

In re HODSON AND HOWES' CONTRACT.

[1886 H. 4295.]

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 21—*Equitable Mortgage—Power to convey—Legal Estate.*

An equitable mortgagee by deed who sells in exercise of the power of sale conferred by the *Conveyancing Act*, 1881, cannot convey the legal estate vested in the mortgagor.

Decision of *North*, J., affirmed.

THIS was a summons taken out by *William Hodson*, as vendor, to have it determined whether an equitable mortgagee by deed exercising his power of sale can convey the legal estate.

By deed dated the 23rd of December, 1884, *Alfred Thompson*, the owner in fee, charged, *inter alia*, a freehold house, known as *Cecil Villa*, with payment to *William Hodson* of a certain mortgage debt thereby secured, and agreed to execute a legal mortgage when required; and it was declared that in case of default as therein mentioned, "the power of sale and all other powers conferred upon mortgagees by deed by the *Conveyancing and Law of Property Act*, 1881, shall immediately be exercisable by the mortgagee" without further demand or notice. *William Hodson* on the 5th of November, 1886, contracted to sell *Cecil Villa* to *Enos Howes*, the Respondent to the summons. An objection was taken on his behalf that the vendor had no power to convey the legal estate.

The summons was heard before Mr. Justice *North* on the 8th of February, 1887.

Porter, for the vendor:—

Under sect. 21 of the *Conveyancing Act*, 1881, a mortgagee by deed who has exercised the power to sell conferred on him by sect. 19, can convey the legal estate in the property sold, though the legal estate is not vested in himself. The corresponding section of *Lord Cranworth's Act* (23 & 24 Vict. c. 145), was the 15th; under that it has been held that a mortgagee of leaseholds by sub-demise could assign the original term: *Hiatt* v. *Hillman* (1). The words of the existing Act are no doubt different, but the object of the Legislature in passing the *Conveyancing Act* was to extend and not to cut down powers of dealing with property. The exception at the end of sect. 21 as to copyholds seems to imply that as a rule the legal estate can be conveyed by a mere equitable mortgagee.

[NORTH, J.:—Do you contend that the legal estate would pass though it were vested in a third person, as trustee for the mortgagor?]

Yes; in that respect the Act is wider than *Lord Cranworth's Act*.

Ingpen, for the purchaser:—

The power is to convey "the estate and interest subject to the mortgage," and the only estate and interest subject to the mortgage is what is vested in the mortgagee. The words of the present Act were apparently purposely altered so as to cut down the power conferred by *Lord Cranworth's Act*.

[NORTH, J.:—One difficulty in holding that the Act gives a power to convey a larger estate than the mortgagee has, is the restriction in the 19th section on the powers there given, they being powers "to the like extent as if they had been in terms conferred by the mortgage deed, but not further."]

Porter, in reply.

(1) 19 W. R. 694.

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NORTH, J.:—

In this case the vendor is a person entitled to an equitable charge by deed. The deed does not contain a power of sale, but he has entered into a contract to sell by virtue of the power contained in the *Conveyancing Act*, 1881, to which the deed referred. An objection taken by the purchaser is that the vendor has no power to convey the legal estate. The legal estate is clearly not in him; it is said to be in the mortgagor. But it is said the mortgagee can convey more than he has himself, and can convey the legal estate. The section on the subject in the earlier Act of Lord *Cranworth* (23 & 24 Vict. c. 145), is the 15th, which enacts that "the person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of." It is said that under that section an equitable mortgagee could convey the legal estate. I am not satisfied that the case cited, *Hiatt* v. *Hillman* (1), goes that length; but assuming that it does, the Act I have to deal with is not that Act, but the *Conveyancing Act*, 1881, sect. 21, the terms of which are very different. They are, "A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage." That appears to me to mean that he has power to convey everything he has got, but nothing further. It goes on to say from what it is freed, "freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage;" and then come these words, "except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf." The mortgagee of copyholds may have had a surrender, with a legal right to admittance on payment of a fine; and this provision is put in to prevent such legal right of admittance passing without his having actually been admitted: that is to say, copyhold or customary

(1) 19 W. R. 694.

land being land in which the lord has an interest his right to a double fine on the admission of the mortgagee, and on the subsequent admission of the purchaser, is not to be prejudiced. That provision applies to all cases in which the mortgagee has a legal right, but not to cases in which he has not. It is not intended to apply to every possible case. We come back, therefore, to the words, "for such estate and interest therein as is the subject of the mortgage." What is subject to the mortgage is the equitable estate and interest vested in the mortgagee. He can convey all he has; but he cannot convey the legal estate. If I held that he could, I should have to hold that he could convey the legal estate if it were vested in a trustee for the mortgagor; but that is impossible. There has been a deliberate departure by the Legislature from the earlier Act; which is repealed. Under those circumstances, I hold that the mortgagee in the exercise of the power of sale conferred on him by the Act can convey all the estate and interest that was conveyed to him; but not the legal estate outstanding in another person.

D. P.

The vendor appealed, and the appeal was heard on the 13th of May, 1887.

Porter, for the appeal:—

Sect. 21 of the *Conveyancing and Law of Property Act*, 1881, gives a mortgagee power to convey the property sold for "such estate and interest therein as is the subject of the mortgage." I say that here the fee is the subject of the mortgage, and that the words "such estate and interest as is the subject of the mortgage," mean "such estate and interest in point of quality and duration as are made subject to the mortgage debt."

[BOWEN, L.J., referred to sect. 19.]

Under *Lord Cranworth's Act* (23 & 24 Vict. c. 145), s. 15, it was held that a mortgagee could convey an estate not vested in him: *Hiatt* v. *Hillman* (1); and the terms of the present Act are similar.

[BOWEN, L.J.:—The wording is materially different.

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COTTON, L.J.:—Suppose the mortgagor had the fee when he made the mortgage, and afterwards parted with it, can the mortgagee afterwards convey the legal estate?]

Yes; the mortgagor could only part with the estate subject to the power vested in the mortgagee. Sect. 34 of the Act, and sect. 20 of the *Settled Land Act*, 1882, shew that a statutory power to an equitable owner to convey the legal estate is nothing unprecedented. Unless the construction for which I contend is put upon sect. 21 the power to convey there given is mere surplusage, for a statutory power is not wanted to enable a man to convey what is in him, and the exception at the end of the section shews that the Legislature considered the effect of the prior part of the section to be very extensive.

Ingpen, contrà, was not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North* declining to make a declaration that a good title had been shewn to the estate contracted to be sold. The Appellant had an equitable mortgage by deed and put up the mortgaged property for sale under the power given by the *Conveyancing and Law of Property Act*, 1881. He relies on sect. 21, and contends that it enables him to convey the legal estate. Now what is a power of sale in a mortgage? It is an equitable authority which enables the mortgagee to sell so as to give the purchaser the estate discharged from the equity of redemption. What is there in the Act to enable a mere equitable mortgagee to convey the legal estate? Sect. 19 provides that the mortgagee shall have the powers therein mentioned, one of which is a power of sale, "to the like extent as if they had been in terms conferred by the mortgage deed, but not further." Now if this mortgage deed, which does not deal with the legal estate, had in terms conferred a power of sale, that power would only have enabled the mortgagee to dispose of the equitable estate. Sect. 21 enacts that a mortgagee exercising the power of sale conferred by the Act shall have power by deed to convey the property sold, for such estate and interest therein

as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority. The power to convey "the property sold" does not enable him to convey the legal estate when a power in the deed would only have enabled him to sell the equitable estate. The expression "property sold" only refers to identification of the property, and the expression "for such estate and interest therein as is the subject of the mortgage" cannot be held to give the mortgagee power to convey all the legal estate which was in the mortgagor at the time of the mortgage. If the mortgage was for a term it would be a strong thing to hold that the mortgagee could sell the fee.

We were referred to sect. 15 of *Lord Cranworth's Act*, and the construction put upon it in *Hiatt* v. *Hillman* (1). It is not necessary for us to consider whether that decision was right or wrong. The words in that section were quite different from those of the present Act: "The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of." When we find in an earlier Act language which has been judicially construed in a particular way, and then find that in a later enactment on the same subject the Legislature uses different language, not so favourable to the construction of the Appellant, it is to be supposed that the intention was not to give to mortgagees the power which they had been held to have under the earlier Act. The great difficulties which would arise from holding that a mortgagee could sell and convey all the estate which the mortgagor had in him at the time of the mortgage would make us hesitate before adopting that view, even if the words of the Act had been much more favourable to it than they are.

LINDLEY, L.J.:—

I am of the same opinion. I was struck by Mr. *Porter's* observation on the exception at the end of sect. 21, but I do not think it decisive. The exception was introduced to make it

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plain that by the general words of the section it was not intended to alter the way of conveying copyholds, and I do not think this sufficient to give to the first part of the clause the effect contended for. The difficulties in the way of carrying out Mr. *Porter's* theory would be very great.

BOWEN, L.J.:—

I am of the same opinion.

Solicitor for vendor: *O. G. Harman.*
Solicitor for purchaser: *R. Parker.*

H. C. J.

TOMKINSON *v.* SOUTH-EASTERN RAILWAY COMPANY.

KAY, J.
1887
May 6.

[1887 T. 657]

Railway Company—Subscribing Company's Funds to Public Objects—Ultrà vires.

At a meeting of the stockholders or proprietors of a railway company a resolution was passed authorizing the directors to subscribe a sum out of the company's funds towards the erection of the *Imperial Institute*:—

Held, that the proposed subscription was not prevented from being *ultrà vires* by the fact that the establishment of the *Institute* might benefit the company by causing an increase of passenger traffic over their line.

THIS was a motion by the Plaintiff, a holder of £500 deferred ordinary stock of the *South-Eastern Railway Company*, for an injunction to restrain the company and its directors, officers, servants, and agents, until the trial of the action or further order, from subscribing, advancing or paying, out of the moneys of the company, the sum of £1000, or any other sum, by way of donation, or otherwise, to or for the purposes of the *Imperial Institute*, or to any person or persons on behalf of the *Institute*.

At a meeting of the stockholders or "proprietors" of the *South-Eastern Railway*, held on the 5th of March, 1887, to consider a circular issued by the executive council of the *Imperial Institute* to the *South-Eastern* and other railway companies, inviting them to subscribe to the funds of the *Institute*, the following resolution was passed, on the motion of the chairman of the company: "That the directors be authorized, either by way of donation from the company or by an appeal to the proprietors, as they may be advised, to subscribe the sum of £1000 to the *Imperial Institute*: provided, that any shareholder who declines to be a party to any such donation shall have his proportion returned to him with his next dividend warrant."

The resolution was carried by 10,229 votes, representing £1,209,035 ordinary stock of the company, against 175 votes, representing stock to the amount of £13,500.

The Plaintiff was not himself present at the meeting, but,

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having read a report of the proceedings, he, on the 11th of March, wrote to the secretary of the company protesting against the proposed application of any of the company's funds towards the *Imperial Institute*, and threatening legal proceedings. In his reply the secretary pointed out that the directors were accustomed to act in obedience to the orders of their shareholders, and not otherwise, and that, having regard to the amount of the Plaintiff's holding, his interest in the contribution of £1000 would be represented by about 13*d*.

After some further correspondence the Plaintiff commenced this action, and now moved as above stated.

In an affidavit in opposition to the motion, the company's general manager stated that, in recommending the proprietors to contribute to the funds of the *Institute*, the directors desired to further its establishment in the belief that a great number of visitors would thereby be drawn from the districts served by their railway and their traffic largely increased; and that, inasmuch as the previous exhibitions at *South Kensington* had, by the issue of through tickets from their system of railways, increased the traffic revenue of the company by several thousands of pounds, the directors believed that the establishment of the *Institute* at *South Kensington* would lead to a similar result. The affidavit further stated that railway companies in general had been accustomed to contribute to the funds of objects likely to encourage traffic upon their lines, such as race-meetings and regattas, and also to hospitals and other public institutions which might benefit their employés.

A. Young, for the Plaintiff:—

The proposed subscription is clearly *ultrà vires*, it not being one of the objects for which the company was incorporated to promote or support popular exhibitions.

Sir *R. Webster*, A.G., *C. T. Mitchell*, and *Worsley Taylor*, for the Defendants:—

It is not *ultrà vires* of a company to expend its funds for the advantage of its undertaking. A company has inherent power to do whatever may be conducive to its popularity or to the objects

of its undertaking: *Taunton* v. *Royal Insurance Company* (1); *Hampson* v. *Price's Patent Candle Company* (2); *Hutton* v. *West Cork Railway Company* (3); *Pickering* v. *Stephenson* (4). As the company are not, we submit, acting *ultrà vires*, the Court will not interfere in their internal affairs: *Foss* v. *Harbottle* (5); *Pickering* v. *Stephenson* (6). Even if the proposed subscription is *ultrà vires*, the damage to the Plaintiff is so infinitesimal that the case is not one for an injunction.

KAY, J.:—

I have no doubt that it is the duty of the Court to grant an injunction in this case.

The question, as the Attorney-General said, is whether the act proposed to be done is within the powers of the railway company, or outside its powers. If it is outside its powers, it is now perfectly settled that any one shareholder may come to this Court and say, "This company is going to do an act which is beyond its powers: stop it;" and the Court thereupon has no discretion in the matter.

Now, what is proposed to be done here is this: the chairman of the railway company, at a meeting of the company, proposed this resolution: "That the directors be authorized, either by way of donation from the company or by an appeal to the proprietors, as they may be advised"—the resolution thus proposing two alternative modes—"to subscribe the sum of £1000 to the *Imperial Institute*." I pause there. The *Imperial Institute* has no more connection with this railway company than the present exhibition of pictures at *Burlington House*, or the *Grosvenor Gallery*, or *Madame Tussaud's*, or any other institution in *London* that can be mentioned. The only ground for the suggestion that this company has the right to apply its funds, which it has been allowed to raise for specific purposes, to this purpose, is, that the *Imperial Institute*, if it succeeds, will very probably greatly increase the traffic of this company. If that is a good reason, then, as I pointed out during the argument, any possible kind of exhibition which, by

(1) 2 H. & M. 135.
(2) 45 L. J. (Ch.) 437.
(3) 23 Ch. D. 654.
(4) Law Rep. 14 Eq. 322.
(5) 2 Hare, 461.
(6) Law Rep. 14 Eq. 339.

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being established in *London*, would probably increase the traffic of a railway company by inducing people to come up to see it, would be an object to which a railway company might subscribe part of its funds. I never heard of such a rule, and, as far as I understand the law, that clearly would not be a proper application of the moneys of a railway company. I cannot distinguish this case from that at all, though, of course, I do not mean to disparage the enormous importance of the *Imperial Institute*. It may be established for the highest possible objects of interest to this country; but still, the only reason given to me why this railway company thinks it right to spend part of its funds in subscribing to it is this, that it will probably greatly increase the traffic of the company by inducing many people to travel up to visit this *Institute*. I cannot accept that as a reason for a moment. Therefore, as at present advised, it seems to me that this is *ultrà vires*.

Before I go further I will read the rest of the resolution: "Provided, that any shareholder who declines to be a party to any such donation shall have his proportion returned to him with his next dividend warrant." That means this: "We, the directors, propose to spend money which ought to be divided among you, the shareholders, in paying a subscription to this *Institute*: if you do not like it, we admit you have a right to object, and your proportion will be returned to you with your next dividend warrant." This shareholder says, "I do not want my money spent in that way;" and he is right, if it is beyond the powers of the company, in saying that the money shall not be spent in that way. Moreover, his objection is not confined to his own share. It is said that his share of the subscription would be comparatively trivial; but, if the subscription is *ultrà vires*, the company ought not to spend a farthing of their funds on the *Institute*. His objection is to the whole expenditure.

Now the cases which have been cited really seem to me to be authorities directly against this proposed application of the company's funds.

I first take *Taunton* v. *Royal Insurance Company* (1). That was a case where an insurance company were proposing to pay certain

(1) 2 H. & M. 135, 140.

risks which they could not legally be compelled to pay; and the evidence, as I remember the case, was that that had been for a long time past treated as within the discretion of managers of insurance companies. Certain cases sometimes arise in which, when the loss has occurred, the policy-moneys cannot legally be demanded from the insurance company; but it has been the general practice among insurance companies—I believe the universal practice, as proved in the case cited—to consider cases of that kind, and for a company to treat itself as not limited strictly by its legal obligations in such cases; but, where the matter is *bonâ fide*, in order to impress the people who deal with the company with an idea of its liberality, the company has been accustomed to pay on such policies, although not legally liable. The Court in the case to which I have referred (which I have always considered carried this doctrine to the very verge to which it ought to go) recognised that well-established practice, and would not restrain that particular company from doing what other companies, or the directors of other companies, in similar cases always did. I noticed, as the Attorney-General read Vice-Chancellor *Wood's* judgment, these words: "It is said that the payment is a mere gratuity. Let it be so called, it does not follow that it is beyond the power of the company if to give such gratuities be the generally received method of conducting such a business."

Then take the next case cited, *Hampson* v. *Price's Patent Candle Company* (1). There the directors of the defendant company gave out of their undivided profits certain extra wages to their workmen. That was held not to be *ultrà vires*. It amounted to no more than this—that the company had workmen with whom they were entirely satisfied, and they wished to give them such encouragement as a good master continually does give to his good servants, by presenting them with something beyond their wages to encourage them in diligent and faithful service. It certainly would have been an extravagant thing to say that the directors of a trading company, who had to hire and pay servants, in giving to their servants a benefit of that kind were acting beyond their powers.

Then take the next case, *Hutton* v. *West Cork Railway Com-*

(1) 45 L. J. (Ch.) 437.

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pany (1). That really was a case in which only the *dicta* supported the decision in *Hampson* v. *Price's Patent Candle Company* (2), but it shewed the limits of that decision very plainly indeed. The *West Cork Railway Company* was being wound up, and on the liquidator proposing to give gratuities to servants whose services were coming to an end it was thought right to restrain him from doing so.

I do not think I need refer particularly to *Pickering* v. *Stephenson* (3). There what was done was decided to be *ultrà vires*, but seeing that the amount which the plaintiff would be entitled to recover was exceedingly minute, the Court would not make an order for payment back to him of the moneys improperly expended.

Does any one of those cases touch the present? Certainly, I should be the last Judge on the bench to extend the meaning of those cases. It is absolutely necessary to keep incorporated or joint stock companies within the limits of their powers. That is a rule which has been recognised over and over again. To say that, because the authorities which have been referred to have held that the acts there done were within the limits of the powers of the company in each case, therefore it follows that any expenditure which may indirectly conduce to the benefit of the company is *intra vires*, seems to me extravagant.

I know of no authority whatever for saying that the payment of £1000 out of the funds of this company as a subscription to the *Imperial Institute* would be within the powers of a railway company. I might stop there, because, this being an application for an interlocutory injunction, I am bound, if I felt difficulty upon the question, to restrain the matter until the trial of the action; but my present opinion is entirely against the validity of this act.

Therefore, it seems to me I am clearly bound to restrain, until the trial of this action, the expenditure of this money out of the company's funds.

An alternative is suggested, as I pointed out, in the resolution inviting the individual proprietors to sanction this payment out

(1) 23 Ch. D. 654. (2) 45 L. J. (Ch.) 437.
(3) Law Rep. 14 Eq. 322.

of their funds, because it says "either by way of donation from the company or by an appeal to the proprietors, as they may be advised." An appeal to the proprietors means an appeal to subscribe £1000, which they are invited to give to the *Imperial Institute*. To that no kind of objection could be made; but this case has been argued on the footing that the alternative adopted by the directors has been, not to take that step, but to apply the moneys of the company. That, it seems to me, the Court is bound to restrain them from doing, and I therefore grant an injunction in the terms of the notice of motion, the Plaintiff giving the usual undertaking in damages.

Solicitors: *F. W. Reynolds; W. R. Stevens.*

G. I. F. C.

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[1886 M. 365.]

Parol Agreement—Part-performance—Easement—Light—Interest in Land—Injunction—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4 [*Revised Ed. Statutes, vol. i., p.* 775.]

The equitable doctrine of part performance has not been confined to contracts for the acquisition of an interest in land.

Probably it applies to all cases in which the Court would entertain a suit for specific performance if the contract had been in writing.

A verbal agreement for an easement may be enforced where there has been part performance, whether it is or is not within the 4th section of the *Statute of Frauds*.

And *semble* it is within the section.

Britain v. *Rossiter* (1) discussed.

The Plaintiff and Defendant, the owners of adjoining houses, being about to rebuild, entered into a verbal agreement that the Plaintiff should pull down a party-wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight with the lower end resting on the party-wall.

The Plaintiff rebuilt the party-wall and erected a lean-to skylight on his side of it as agreed: the Defendant also erected a skylight on his side, but, instead of a lean-to, so shaped it as to obstruct the access of light to the

(1) 11 Q. B. D. 123.

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Plaintiff's premises more than the agreed lean-to skylight would have done:—

Held, that the effect of the agreement was to give to each party an easement of light over the other's land; and that the Plaintiff, having performed the agreement on his part, was entitled to have it enforced on the part of the Defendant. A mandatory injunction was accordingly granted, the Plaintiff being put under a corresponding undertaking.

TRIAL OF ACTION.

The facts of the case, so far as they are material for this report, were as follows:—

The Plaintiff and Defendant were owners of adjoining houses, Nos. 44 and 43, *Gutter Lane*, in the city of *London*. In a kind of well at the back of the two houses was a party-wall supporting the lower ends of two lean-to skylights which admitted light to the ground-floors of the respective premises, the upper ends being fixed against the walls of the two houses respectively. The lower ends touched the party-wall at a point several feet below the top of it, so that the upper part of the wall interfered to a considerable extent with the access of light to both skylights. In November, 1885, the parties, being about to rebuild their respective premises, had an interview at which, as the Plaintiff alleged, a verbal agreement was entered into between them as to the mode in which the skylights should be reconstructed, the alleged agreement being thus stated in the statement of claim:—

"In the month of November, 1885, the Plaintiff and the Defendant, being desirous of rebuilding their respective premises, had several interviews in order harmoniously to arrange their new buildings so as not to interfere with each other's convenience. At one of such interviews it was verbally agreed between the Plaintiff and the Defendant in the presence of the Plaintiff's foreman, and upon drawings submitted shewing the intended construction of skylights, that the Plaintiff should at their joint expense pull down and rebuild a certain party-wall dividing the said premises, and also that each party should be at liberty to make a lean-to skylight resting on the said party-wall and running up to the sill of the first-floor window of his own building."

The Defendant, however, denied any agreement on his part as to a lean-to skylight.

Upon the question of the agreement, the Plaintiff deposed that at one of his interviews with the Defendant—and the Plaintiff's evidence on this point was confirmed by that of his foreman, who was present—it was agreed that at the joint expense of the Plaintiff and Defendant, the party-wall in question should be pulled down and rebuilt by the Plaintiff, a thinner wall being built upon the middle line of it so as to increase the space on both sides, which new wall was to be several feet lower, as shewn on a sketch produced at the interview. The Plaintiff further deposed that the question of the skylights was also discussed at that interview, when it was decided to erect two, one on his side, starting from the gutter-line on the new party-wall, and one on the Defendant's side, both inclining upwards from that wall; and that to give the parties increased light they were to have one gutter-line on the top of the wall between the two skylights.

The Defendant in his evidence admitted that it was agreed the Plaintiff should pull down the wall and rebuild it at their joint expense; but he denied that anything was said about lowering the height of it. He also admitted that the Plaintiff suggested that one gutter should be used for both skylights, in answer to which he said he would confer with his architect; but he denied that any agreement was made as to the exact position and mode of construction of the skylights, or that any sketch or plan was produced to him.

Upon a consideration of the evidence on this part of the case His Lordship came to the conclusion that the Plaintiff had established his version of the agreement, saying he had no doubt that one of the objects of both parties was to get rid of the superfluous height as well as thickness of the old party-wall, and that such lowering was for the purpose of increasing the light to both intended skylights. That these skylights were to be so constructed as to run down to the same gutter was in fact, as his Lordship considered, admitted by the Defendant in his evidence, and his Lordship further said he had no doubt it was agreed that both should be lean-to skylights so as to interfere as little as possible with the light to either.

Eventually the Plaintiff built the new party-wall, paying half

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the expense of it, and erected a lean-to skylight on his side of the wall as agreed upon; except that, in consequence of objections by the fire insurance office, the skylight was constructed with a separate and distinct gutter of its own. The Defendant also constructed a skylight and gutter on his side of the wall, but instead of a lean-to he so shaped his skylight as to shew part of it above the wall, and thus obstruct the access of light to the Plaintiff's. The Plaintiff thereupon remonstrated with the Defendant, who however insisted on maintaining his skylight as constructed, although it appeared from the evidence that it might have been altered at an expense of about £10.

The Plaintiff then brought this action claiming an injunction to restrain the Defendant from permitting his skylight to remain in its present position, or from erecting any structure contrary to the alleged agreement.

It also appeared from the evidence that, subsequently to the interview at which the alleged verbal agreement was entered into, the Defendant wrote to the Plaintiff offering to line the wall of his, the Defendant's, premises above his skylight with *Hall's* patent white glazed tiles, but that the Defendant eventually used tiles of an inferior description, some of which burst and fell off from the action of frost. At the trial the Defendant by his counsel offered to substitute *Hall's* patent glazed tiles for the inferior tiles as agreed by his letter.

Tindal Atkinson, Q.C., and *Oswald*, for the Plaintiff:—

We submit we have made out a good parol contract, and that there has been such a part-performance of it on our part as to prevent the application of the *Statute of Frauds*, 29 Car. 2, c. 3. This then is a case of interference with light contrary to contract: and whether the right to light is prescriptive or rests on contract the Court will interfere by injunction to prevent the breach of a contract entered into with reference to the enjoyment of such right. The rules are that the Court will enforce a contract where (1) the work to be done is defined; (2) where the Plaintiff has a material interest in its execution which cannot adequately be compensated for by damages; and (3) where the

Defendant has by the contract obtained from the Plaintiff possession of the land on which the work is to be done: *Fry* on Specific Performance (1).

Ince, Q.C., and *Christopher James*, for the Defendant:—

This is a contract—if there is a contract at all—to which the equitable doctrine of part-performance does not apply. The old doctrine as to part-performance, whereby a contract not enforceable by an action at law, owing to the provisions of the *Statute of Frauds*, sect. 4, was rendered enforceable in equity, was confined to suits as to the sale of interests in land, and its operation has not been extended by the *Judicature Act*, 1873: *Britain* v. *Rossiter* (2); *Maddison* v. *Alderson* (3). The doctrine therefore does not extend to an easement which is not an interest in land. The mere erection by the Plaintiff of a building on his land is not part-performance: it might have been different if he were in possession of the Defendant's land.

[KAY, J.:—Through the execution by the Plaintiff of his part of the agreement you are in possession of an easement of light, which you could not have had except by the agreement.]

We are only in possession of a window looking out in a particular direction; but we cannot prevent its being built against, except by proving that we enjoy an easement of light by contract. To be an easement the right must be safeguarded by a contract which cannot be questioned, but that is not the case here.

[KAY, J. referred to *Nunn* v. *Fabian* (4), and *Storer* v. *Great Western Railway Company* (5).]

The doctrine of part-performance is not to be extended beyond cases in which there has been an actual change of possession: *Maddison* v. *Alderson* (6). The alleged agreement, being for a perpetual easement, and therefore not capable of being performed within a year, cannot be enforced, as it is not in writing as required by sect. 4 of the *Statute of Frauds*.

Oswald, in reply.

(1) 2nd Ed. p. 38.
(2) 11 Q. B. D. 123.
(3) 8 App. Cas. 467, 474.
(4) Law Rep. 1 Ch. 35.
(5) 2 Y. & C. Ch. 48, 54.
(6) 8 App. Cas. 490.

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A question of considerable interest has been argued in this case, namely, whether the agreement alleged is one to which the equitable doctrine of part-performance, so as to avoid the *Statute of Frauds*, would apply.

[His Lordship then went through the facts of the case in detail, expressing his opinion, as already stated, that the Plaintiff had established the existence of an agreement as alleged by him. His Lordship also said he was satisfied on the evidence that the Defendant's skylight obstructed the access of light to the Plaintiff's skylight to an appreciable extent; and he then proceeded:—]

I conclude from the evidence that there was a verbal agreement not only as to pulling down and rebuilding the party-wall, but also as to the height of such new wall, and as to the position and shape of the skylights on either side of it.

The Plaintiff has carried out his part of that agreement by pulling down and rebuilding the wall as agreed, and placing his skylight in the agreed position.

It is obvious from the facts I have stated that such an agreement as is alleged would give to each of the parties, Plaintiff and Defendant, additional light coming over the land of the other to his skylight, and this would be in the nature of an easement to each party over his neighbour's land.

Moreover, the wall which was to be rebuilt would be partly on the land of one and partly on the land of the other, and neither party could have pulled it down or rebuilt it without the consent of the other. The agreement, therefore, was a mutual one as to the mode of separating the land of the Plaintiff and Defendant at the boundary between them.

The agreement does not seem to come within sects. 1, 2, or 3 of the *Statute of Frauds*, but the question is whether it is not within sect. 4, which provides that "no action shall be brought whereby . . . . to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the

agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

I quote all the material words of this section because, much as they have been considered, there is a certain amount of novelty in some of the questions which arise in this case.

In the first place, I adopt the view that the grammatical construction is, no action shall be brought to charge any person "upon any contract or sale," &c., and not "upon any agreement made upon any contract or sale of lands" as suggested by Lord *St. Leonards* in a note to his work on Vendors and Purchasers (1). The words that follow "or upon any agreement that is not to be performed" within a year—support this construction. It would be absurd to repeat the word "agreement" in that place, and the construction which seems to me the more grammatical one is that which has been usually accepted.

It has often been decided that this section applies to contracts concerning an interest in land not being contracts of sale. For example, in *Alchin* v. *Hopkins* (2) an agreement for a composition with creditors, which provided that the profits of the defendant's benefice with cure of souls should be received by a receiver and a portion thereof applied in liquidation of his debts, was held to be within this section. So an agreement to repay a loan out of the future rent of a farm: *Ex parte Hall* (3).

In *Wood* v. *Lake* (4) a parol agreement that the plaintiff should have liberty to lay and stack coals upon the defendant's land for seven years, which he had done for three years under the agreement, was held to be a license which had become irrevocable, and not to amount, although an easement, to an "interest in land" within the 4th section of the *Statute of Frauds.*

In *Wood* v. *Leadbitter* (5) Baron *Alderson*, commenting upon that case, says that no grounds are stated on which it could be held good as an easement originating merely by parol, but that

(1) 11th Ed. p. 94, n.; see 14th Ed. p. 123.
(2) 1 Bing. N. C. 99.
(3) 10 Ch. D. 615.
(4) Say. 3; 13 M. & W. 848, n.; *Gale* on Easements, 5th Ed. p. 65, n.
(5) 13 M. & W. 838, 850.

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it was probably an action of *assumpsit* in which "the plaintiff would certainly be entitled to recover, if the contract was not (and probably the Court considered it was not) a contract concerning land, within the 4th section of the *Statute of Frauds*." However, even then it was an agreement which could not be performed within a year, and would on this ground be avoided by another part of the same 4th section if that applies to such an agreement at all: evidently the Court considered that this part of the section did not apply.

In *Taylor* v. *Waters* (1) a right of admission to a theatre was held not to be an interest in land within the 4th section. The authority of the decision that this was a license which was irrevocable at common law has been questioned upon the ground that the right was an easement which could only be granted by deed: *Wood* v. *Leadbitter* (2); but not upon the point that such an interest was not within sect. 4.

The same thing was decided in *Hewlins* v. *Shippam* (3) as to the incorporeal hereditament of the right to use a drain across the defendant's land. This, it was held, was an easement and not an interest in land.

Again, in *Jones* v. *Flint* (4) an easement of the right to enter the land to harvest and carry away the growing produce was held not to be an interest in the land.

If therefore an easement is not an "interest in the land" under sect. 4 of the *Statute of Frauds*, it follows that, although no such incorporeal hereditament can be granted except by deed, an agreement for such grant need not be in writing as a contract for an interest in land.

But it is argued that an agreement to allow a perpetual easement is not an agreement that can be performed within a year, and therefore is avoided, unless in writing, by the same statute.

The agreement, as alleged and proved here, was not in terms an agreement for an easement, but an agreement so to construct the wall and skylights that an easement of more light over the land of the other to his skylight would result to each party. The purpose and effect was to secure this easement to each. It is

(1) 7 Taunt. 374.
(2) 13 M. & W. 852.
(3) 5 B. & C. 221.
(4) 10 A. & E. 753, 759.

clear that at law such an easement can only be granted by deed.

In *Wood* v. *Leadbitter* (1) the doctrine of the common law is thus stated: "A license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant . . . . of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a *valid* grant, and it is therefore revocable."

On this ground it was held in *Hewlins* v. *Shippam* (2) that, where for valuable consideration the defendant had permitted the plaintiff to make at his own expense a drain in the defendant's land, the defendant might nevertheless stop it at his pleasure, because the easement of its continual use could only be granted by deed.

But in *Hollis* v. *Edwards* (3) it was held that the proviso of sect. 4, relating to agreements which could not be performed within a year, did not extend to any agreement concerning lands or tenements.

That an agreement for an easement sufficiently concerns lands and tenements to be within that decision seems to have been decided or assumed in the comments on *Wood* v. *Lake* (4) above cited.

The result, if this be law, is strange and not very satisfactory. An agreement to grant a perpetual easement over land is not an agreement to give an interest in land within sect. 4, and yet it so far concerns land that it is not within the other part of the section which requires agreements that cannot be performed within a year to be in writing.

I confess I should have thought that such an agreement must come within one clause or other of this section, and my own opinion would have been that such an agreement sufficiently concerns land to come within that part of the provision. The words are: "Any contract . . . . of lands, tenements, or hereditа-

(1) 13 M. & W. 838, 845.
(2) 5 B. & C. 221.
(3) 1 Vern. 159.
(4) Say. 3 13 M. & W. 848, n.; *Gale* on Easements, 5th Ed. p. 65, n.

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ments, or any interest in or concerning them," which are quite capable of being read "Any contract concerning lands, tenements, or hereditaments;" and such a contract, if not concerning lands, is certainly concerning a hereditament.

The argument, however, may be stated thus: the agreement sought to be enforced is a parol agreement for an easement, assuming that it is not for an interest in land; but such an easement can only be granted by deed; and a parol agreement of which part is to have such an easement is merely a license revocable because coupled with an invalid grant. On the other hand, it may be said, admitting this to be the doctrine of the common law, the Plaintiff in this case has pulled down and rebuilt a wall partly on his own and partly on the Defendant's land, and has put the Defendant in actual possession of all the advantages of that new wall, namely, increased space on the Defendant's side and an increased easement of light over the Plaintiff's land by reason of the lowering of the wall: will the Court of Equity permit the Defendant to depart from his agreement, though only parol, when the Plaintiff on the faith of it has thus expended money and given the Defendant advantages including an easement over the Plaintiff's land?

The reply made in argument to this is, that is the doctrine of part-performance, but such doctrine only applies to cases of sale of land, or at any rate contracts for an interest in land within the statute; and for this is cited the recent decision of *Britain* v. *Rossiter* (1). In that case the contract had nothing to do with land, but was merely a contract of hiring and service, which could not be performed within a year. Courts of Equity would not decree specific performance of such a contract, even if in writing. Lord *Esher* says the doctrine of part-performance "was exercised only as to cases concerning land, and was never extended to contracts like that before us, because they could not be brought within the jurisdiction of Courts of Equity." Lord Justice *Cotton* says: "The doctrine as to part-performance has always been confined to questions relating to land." But Lord Justice *Thesiger* seems to treat it as confined to sales of land, which view is adopted in the head-note of the report.

(1) 11 Q. B. D. 123, 129, 131.

Earl *Selborne* in *Maddison* v. *Alderson* (1) points out that the limitation of the equitable doctrine in *Britain* v. *Rossiter* (2) to cases concerning land is hardly reconcilable with the view expressed by Lord *Cottenham* in *Hammersley* v. *De Biel* (3), and *Lassence* v. *Tierney* (4).

To these cases may be added the authority of Lord *Hardwicke* in *Taylor* v. *Beech* (5), who says expressly, when overruling a plea of the statute in a case where the agreement was to settle £500 belonging to the intended wife, "although the *Statute of Frauds* is a protection against the defendant's making a discovery of a parol agreement, and therefore it may be pleaded as well to the discovery as relief, yet that rule extends not to facts subsequent, viz., shewing a part-performance; in which case the statute cannot be pleaded. Although it is true, that in the case of marriage agreements it is otherwise: though it is not mere marriage occasions that without something else." I have examined the bill and plea in that case in the original record. There was no contract concerning land. The wife was entitled to a sum of £500 secured by a mortgage. The alleged agreement was that this should be settled. Certain acts of part-performance by the husband were alleged, and Lord *Hardwicke*, clearly recognising that marriage alone would not be part-performance, overruled the plea on the ground that such an agreement might be enforced if other acts of part-performance were proved.

Turning to the cases on part-performance, the statement of the doctrine and the grounds on which it rests do not necessarily confine it to agreements for sale or acquisition of an interest in land.

In *Morphett* v. *Jones* (6) Sir *T. Plumer* states the equitable doctrine thus (7): "In order to amount to part-performance, an act must be unequivocally referable to the agreement; and the ground on which Courts of Equity have allowed such acts to exclude the application of the statute, is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is

(1) 8 App. Cas. 467, 474.
(2) 11 Q. B. D. 123.
(3) 12 Cl. & F. 64, n.
(4) 1 Mac. & G. 551, 572.
(5) 1 Ves. Sen. 297, 298.
(6) 1 Swans. 172.
(7) 1 Swans. 182.

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entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referable to the contract. Between landlord and tenant, when the tenant is in possession at the date of the agreement, and only continues in possession, it is properly observed that in many cases that continuance amounts to nothing; but admission into possession having unequivocal reference to contract, has always been considered an act of part-performance. The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms; the Court regarding what has been done as a consequence of contract or tenure."

In the speech of Earl *Selborne* in *Maddison* v. *Alderson* (1), which contains an elaborate examination of this doctrine of part-performance, the latter portion of the quotation which I have just cited is mentioned with approval, and also these words of the late Vice-Chancellor *Wigram* from *Dale* v. *Hamilton* (2): "It is, in general, of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in, if there were no contract." The Vice-Chancellor further says: "Of this, a common example is the delivery of possession. One man, without being amenable to the charge of trespass, is found in the possession of another man's land. Such a state of things is considered as shewing unequivocally that some contract has taken place between the litigant parties; and it has, therefore, on that specific ground, been admitted to be an act of part-performance: *Morphett* v. *Jones* (3)." After reading a further part of that judgment, and referring to Lord Justice *Cotton's* judgment in *Britain* v. *Rossiter* (4), Earl *Selborne's* conclusion is, "the acts of part-performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land. The law of

(1) 8 App. Cas. 479.
(2) 5 Hare, 369, 381.
(3) 1 Swans. 172.
(4) 11 Q. B. D. 130.

equitable mortgage by deposit of title deeds depends upon the same principles."

Instances of part-performance where there has been no change of possession may easily be given. For example, in *Wills* v. *Stradling* (1) a tenant of a farm was allowed to enforce a parol agreement for a new lease at an increased rent on the faith of which he had laid out money in improving the property and paid the increased rent, Lord *Loughborough* saying that the mere holding over would not of itself take the case out of the statute; but if it was part of the contract that money should be laid out and that was one of the considerations for granting the lease, it is very strong to take it out of the statute. But in that case the Lord Chancellor relied chiefly upon the payment of the increased rent. This was followed by Lord *Cranworth* in *Nunn* v. *Fabian* (2), where the distinction was drawn that the expenditure of money by a tenant, though not part of the agreement, and therefore not part-performance, might be treated as evidence that there was some agreement. And in *Caton* v. *Caton* (3) the same Lord Chancellor, pointing out that the part-performance must be by the person seeking to enforce the parol agreement, says (4): "If I agree with *A.*, by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling *A.* to complete the purchase, but it certainly would afford no foundation for a claim by *A.* to compel me to sell on the ground that I had partly performed the contract."

Thus far I have examined somewhat critically the general doctrine out of deference to the *dicta* in *Britain* v. *Rossiter* (5) and to the argument that these *dicta* are conclusive against the claim in the present case.

I now proceed to consider the well-known authorities which apply to the case of easements obtained under parol agreements which have been partly performed.

First of all, there is the familiar case of *East India Company*

(1) 3 Ves. 378.
(2) Law Rep. 1 Ch. 35.
(3) Law Rep. 1 Ch. 137.
(4) Ibid. 148.
(5) 11 Q. B. D. 123.

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v. *Vincent* (1), where, after an agreement by the owner of adjoining land to the erection of a certain building upon terms which were acquiesced in, he built a wall to obstruct the lights in such building. Lord *Hardwicke* ordered him to pull it down. It appears from the Registrar's book, which I have examined, that the facts shortly were that the plaintiffs had an ancient messuage in *Leadenhall Street* abutting, on the north and east sides, upon a small piece of ground used as a yard in the possession of the defendant. This messuage had ancient windows on the east side overlooking such yard. The plaintiffs pulled it down and were rebuilding it, intending to make new windows not only where the old ones were on the east side, but also new windows on the north side looking on the defendant's yard, and the defendant in conversation with a director of the plaintiff company said he would oppose the making such lights unless the sashes of the windows on the east as well as on the north side were made so as not to slide, and wrinkled glass put in the lower part of such windows. But if that were done he agreed that the windows might be finished and the plaintiffs have the benefit thereof, and about the same time he applied to be employed by the plaintiffs as a packer. The windows were made as the defendant desired, and he was employed as a packer for some time and was then discharged, but was again taken into their service, and they submitted to continue him in such employment. The defendant had lately begun a building in his yard which darkened the plaintiffs' windows. The defendant pleaded the *Statute of Frauds* by his answer: but it was declared that the plaintiffs were entitled to the benefit of the agreement relating to the lights, and should be quieted in the enjoyment of them, being ordered to fulfil their part of the agreement, amongst other things, by employing the defendant as a packer, and the defendant was ordered at his own expense to remove the wall, and was restrained from making any other building or erection whereby the plaintiffs' said lights might be obstructed.

It is clear that if a man diverts a watercourse, which diversion causes a nuisance to his neighbour, or builds a house partly on his neighbour's land, and the neighbour acquiesces in this being

(1) 2 Atk. 83.

done, Courts of Equity will interfere to prevent him from disturbing it: *Anon.* (1).

So, where one allowed a colliery shaft to be sunk which would be of no use without a road over his land, he was compelled in equity to give the road: *Clavering's Case* cited in *Jackson* v. *Cator* (2).

In the last-mentioned case, *Jackson* v. *Cator*, a lessor had reserved all trees, but having acquiesced in certain alterations of the grounds by the lessee, to the beauty of which it was essential that some of the trees should be left, which he had consented should be done, he was restrained from cutting them down.

In the well-known case of *Dann* v. *Spurrier* (3) the doctrine is thus stated (4): "This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting those acts, which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment."

In *Powell* v. *Thomas* (5) this doctrine was applied to a case in which the plaintiff had made a railway over the defendant's land without objection from the defendant, the only dispute being on the question of price, and the Court of Equity restrained the defendant from prosecuting an action of ejectment. So, in the case of *Duke of Devonshire* v. *Eglin* (6), the defendant allowed the plaintiff to make a watercourse under his land to convey water to a town. The watercourse was made at the plaintiff's expense, and this easement was enjoyed for about nine years, and although there was no grant the defendant was decreed to execute a proper deed, and a perpetual injunction was granted to restrain his interference with the watercourse. *Hewlins* v. *Shippam* (7), *Wood* v. *Leadbitter* (8), and other authorities at Common Law, were cited, and it was argued that the right

(1) 2 Eq. C. Ab. 522.
(2) 5 Ves. 688, 690.
(3) 7 Ves. 231.
(4) Ibid. 235.
(5) 6 Hare, 300.
(6) 14 Beav. 530.
(7) 5 B. & C. 221.
(8) 13 M. & W. 838.

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claimed could only be granted by deed, and that therefore the license was revocable; but this common law doctrine was not allowed to prevail in equity.

The equitable doctrine was applied in *Rochdale Canal Company* v. *King* (1), also the case of an easement; and in *Cotching* v. *Bassett* (2), where, the plaintiff having made an alteration of the ancient lights of his house such as it was then understood would give the defendant a right to interfere with them, the defendant was restrained from doing so on proof that he had acquiesced in such alterations. In *Ramsden* v. *Dyson* (3) Lord *Kingsdown* states the rule of equity thus (4): "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory* v. *Mighell* (5), and, as I conceive, is open to no doubt."

These words were quoted with approval in the judgment of the Privy Council in *Plimmer* v. *Mayor of Wellington* (6), where, a jetty having been extended upon land of the defendants with their consent, it was held that a license to use that land for the purposes of a wharfinger had thereby become irrevocable in equity.

In *Russell* v. *Watts* (7) Earl *Selborne* says (8): "If on a sale and conveyance of land adjoining a house to be built by the vendor it is mutually agreed that one of the outer walls of that house may stand (whether wholly or partly I think is immaterial) within the verge of the land sold, and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly," the purchaser cannot afterwards

(1) 16 Beav. 630.
(2) 32 Beav. 101.
(3) Law Rep. 1 H. L. 129.
(4) Ibid. 170.
(5) 18 Ves. 328.
(6) 9 App. Cas. 699, 710.
(7) 10 App. Cas. 590.
(8) Ibid. 602.

build upon the land sold so as to prevent or obstruct the access of light to such windows.

These authorities seem to me to establish the following propositions: (1.) The doctrine of part-performance of a parol agreement, which enables proof of it to be given notwithstanding the *Statute of Frauds*, though principally applied in the case of contracts for the sale or purchase of land, or for the acquisition of an interest in land, has not been confined to those cases. (2.) Probably it would be more accurate to say it applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing. (3.) The most obvious case of part-performance is where the defendant is in possession of land of the plaintiff under the parol agreement. (4.) The reason for the rule is that where the defendant has stood by and allowed the plaintiff to fulfil his part of the contract, it would be fraudulent to set up the statute. (5.) But this reason applies wherever the defendant has obtained and is in possession of some substantial advantage under a parol agreement which, if in writing, would be such as the Court would direct to be specifically performed. (6.) The doctrine applies to a parol agreement for an easement, though no interest in land is intended to be acquired.

I have no doubt that the present case comes within the principle of these decisions.

I find the Defendant in possession of an easement of light over the Plaintiff's land by reason of the Plaintiff having taken down and re-erected at a less height a boundary wall partly on the Defendant's and partly on the Plaintiff's land. By the same act the Defendant has been put in possession of a larger space on his side of the wall, the new wall erected being much thinner than the old one.

These acts could not have been done by the Plaintiff and these advantages could not have been obtained by the Defendant without some agreement between them. According to *Morphett* v. *Jones* (1) the Court is bound to inquire what that agreement was. I find it to be one by which the Plaintiff was to have, as his part of the arrangement, a better light to his skylight over the

(1) 1 Swans. 172.

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Defendant's land, and this was to be secured to him by the construction, in an agreed position, of a lean-to skylight on the Defendant's side.

The Defendant having obtained all the advantages which this agreement was intended to give him, it would be a fraud on his part to refuse to carry out his part of the agreement, and to resist an attempt to compel him to do so by insisting on the *Statute of Frauds*.

Therefore, if the statute applies—as in my opinion it should—the equitable rule in cases of part-performance applies also.

The case is proper for a decree against the Defendant to specifically perform his part of the parol agreement.

Bearing in mind the rule of the Court as to mandatory injunctions, as expressed in *Durell* v. *Pritchard* (1), I am clearly of opinion that this is a case in which a mandatory injunction should be granted. The inconvenience of altering his skylight in accordance with the agreement would be insignificant to the Defendant, but if unaltered it would be extremely difficult to estimate the damage which the Plaintiff would suffer.

I think the order should be in this form: It appearing to the Court that the verbal agreement as to putting down and rebuilding the party-wall, and the position of the proposed skylights on either side of it, as alleged in the statement of claim, is proved, and that the Plaintiff has duly performed his part of it, order a perpetual injunction to restrain the Defendant from permitting his present skylight to remain, and from placing any other skylight or erection on his side of the wall in question, between it and the walls of his house which will obstruct the passage of light to the Plaintiff's skylight more than the skylight which the Defendant agreed to erect would have done; the Plaintiff on his part undertaking not to place any skylight or other construction on his side of the wall, between it and the walls of his house which will obstruct the light to the Defendant's proposed skylight more than the present wall and the skylight of the Plaintiff will do; if necessary, order a proper deed to be executed to secure these easements to both parties.

The Defendant has not fulfilled his agreement to cover the

(1) Law Rep. 1 Ch. 244.

back walls of his new building with *Hall's* patent tiles. He has covered part of them with inferior white tiles, which are already considerably injured by frost. At the Bar he has offered an undertaking to cover these walls with *Hall's* patent tiles as agreed.

I must remark that his bad faith as to this part of his agreement with the Defendant strengthens my conviction as to the truth of the Plaintiff's story concerning the skylights.

The Defendant must pay the costs of the action.

Solicitors: *Hogan & Hughes*; *Boyce & Son.*

G. I. F. C.

CHITTY, J.
1887
June 18.

OAKEY & SONS *v.* DALTON.

[1886 O. 472.]

Trade-mark—Infringement—Death of registered Owner—Right of Executors to sue—Actio personalis moritur cum personâ.

An action to restrain the infringement of a registered trade-mark with the usual claim for an account of profits and damages is not within the rule *actio personalis moritur cum personâ*, but, being brought in respect of injury to the property of the owner of the mark, may be continued by his executors after his death.

ON the 12th of November, 1886, *John Oakey*, trading as "*John Oakey & Sons*," commenced this action in the name of *John Oakey & Sons* to restrain an infringement of Plaintiffs' registered trade-mark for "*Wellington Knife Polish*," and on the 9th of December, 1886, the statement of claim was delivered, alleging that the Defendant's label was calculated to induce the trade and the public to believe that the goods manufactured and sold by the Defendant were goods made by the Plaintiffs, and that the Defendant was selling and passing off on the trade and public his goods as and for the goods of the Plaintiffs; and claiming an injunction to restrain an infringement of Plaintiffs' registered trade-mark, and the use of labels in imitation of or only colourably differing from Plaintiffs' registered labels, and calculated to lead the trade and public to believe that the knife polish made by the Defendant is the knife polish made by the Plaintiffs, and from selling their goods as and for the goods of the Plaintiffs. Delivery up of the Defendant's labels, an account of sales, and damages were also claimed.

On the 30th of December, 1886, the Defendant delivered his statement of defence denying infringement.

When the action was commenced *John Oakey* was the only member of the firm of *John Oakey & Sons*. He died on the 10th of January, 1887, having by his will, dated the 10th of May, 1886, devised and bequeathed the residue of his real and personal estate, including his business of glass paper, black lead, and

emery cloth manufacturer, and any other trade or business carried on by him, or in his name, or in the name of "*John Oakey & Sons*," and all the stock-in-trade, trade-marks, patents, materials, and book debts of the business, and the goodwill of the same, unto and to the use of *Alexander Martin*, *Benjamin Gallaway*, *Herbert Oakey*, and *George Blackman*, whom he had appointed executors, or other the trustees of his will for the time being, on certain trusts.

On the 1st of April, 1887, the acting executors, *Gallaway*, *Oakey*, and *Blackman*, who had proved the will, obtained an order that the proceedings in the action be carried on by them as Plaintiffs.

On the 3rd of May, 1887, an amended statement of defence was delivered alleging that *John Oakey*, deceased, carried on business under the firm of "*John Oakey & Sons*," but was the only member of the firm, and submitting that the cause of action in respect of the matters alleged in the statement of claim "was personal to him" (the said *John Oakey*) "and has not passed to his legal personal representatives, and that *Benjamin Gallaway*, *Herbert Oakey*, and *George Blackman*, who, as being executors of the said *John Oakey's* will, are carrying on the proceedings in this action, are not entitled to the relief claimed in this action or to any part of such relief."

The Plaintiffs, under Order XXV., rule 2, had set down for argument, prior to the hearing of the action on the merits, the point of law thus raised.

Romer, Q.C., and *Willis Bund*, for the Plaintiffs:—

The maxim "*Actio personalis moritur cum personâ*" has no application to a case like this, where the injury complained of is an injury, not to the deceased Plaintiff personally, but to his property in the trade-mark, which passes to his legal personal representative as part of his personal estate: *Gibblett* v. *Read* (1); *Croft* v. *Day* (2); *Sebastian* on Trade-marks (3). In addition to an injunction, the action claims an account of profits wrongfully made by the Defendant, and damages for injury to the sale

(1) 9 Mod. 459. (2) 7 Beav. 84.
(3) 2nd Ed. p. 96.

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of Plaintiffs' goods, and that is a cause of action which survives to the executors: *Hatchard* v. *Mège* (1).

Aston, Q.C., and *Bardswell*, for the Defendant:—

No case is to be found in which the right of action which is here claimed has been held to survive to the executors of the deceased plaintiff. The object of the action being primarily to restrain an alleged personal injury to *John Oakey* in his trade, and not alleging injury to his property, it is a case of simple tort, to which the rule *actio personalis moritur cum personâ*, as explained by Mr. Justice *Pearson* in *Phillips* v. *Homfray* (2) will apply, and the executors cannot continue the proceedings: *Ireland* v. *Champneys* (3). In *Hatchard* v. *Mège* the legal personal representative was held entitled to recover on proof of special damage to the testator's property, but not on the mere allegation of injury to trade. In any case an injunction to restrain the infringement of a registered trade-mark can only be obtained by the registered owner of the mark, a title to sue being acquired by registration only; and the Plaintiffs must therefore shew not only that the right to their testator's trade-mark has been transmitted to them, but also that they are the registered owners.

CHITTY, J.:—

The action is a simple action in respect of an alleged infringement of the registered trade-mark of *John Oakey*, who carried on business until the end of his life as *John Oakey & Sons*, and the relief asked is in the usual form for an injunction, destruction of labels, and an account of profits wrongfully made by the Defendant. The Plaintiff having died, the question is whether his executors are entitled to carry on the action. In my opinion they are. The executors take the personal estate of their testator *John Oakey*, and the statement of claim shews sufficiently that the Defendant has been infringing—for on that point I entertain no doubt—the trade-mark, which is property: that is to say, injuring the property of the deceased man, and causing damage to his personal estate, which has diminished the amount of the

(1) 18 Q. B. D. 771. (2) 24 Ch. D. 439, 445.
(3) 4 Taunt. 884.

assets. I also think that the statement of claim sufficiently shews that the Defendant has made profits which he seeks to retain, notwithstanding there is no distinct allegation to that effect; so that it comes to this, that the executors are entitled to recover damages for the wrong done, and also, if they think fit, according to the actual claim they have made, to recover the profits made by the Defendant. It also appears that the Defendant has documents in his possession which he has no right to retain, viz. wrongful imitations of the Plaintiff's trade-mark.

I think the case is covered entirely by principle; the principle on which I proceed being that there is an injury to the personal estate of a deceased person, and that damages have been occasioned to that person's estate, and profits have accrued to the wrongdoer. The result is that I decide the point of law in favour of the Plaintiffs, and the costs of the Plaintiffs must be theirs in any event. I purposely refrain from saying anything about an injunction. That is a subordinate point on which I say nothing.

Solicitors: *Paddison, Son, & Co.; Horne & Birkett*, agents for *Thomas Chorlton, Manchester*.

F. G. A. W.

NORTH, J.

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March 9, 10, 14, 15, 16; *April* 21.

In re HENDERSON. NOUVION *v.* FREEMAN.

[1883 H. 2042.]

Foreign Judgment.

Besides "plenary" proceedings in which all rights can be contested between the parties, summary proceedings called "executive," can be taken in the Spanish Courts in respect of certain matters. In such proceedings certain defences only can be raised. Notwithstanding a judgment in executive proceedings, "plenary" proceedings can be taken by either party in respect of the same matter, which may supersede such judgment; but the judgment can in the meantime be executed:—

Held, that a judgment in "executive" proceedings is a final judgment and can be sued upon in this country.

THIS was an action, commenced on the 12th of May, 1883, by a person claiming to be a creditor of *William Henderson*, a deceased testator, under certain foreign judgments. The deceased died in December, 1880, a domiciled Scotchman. The Plaintiff claimed administration of the assets of the deceased in *England*. The first judgment sued upon was made on the 5th of April, 1878. The other judgments were ancillary judgments for costs and interest, and may be neglected for the purpose of this report. The judgment of April, 1878, was obtained upon two notarial instruments made in accordance with Spanish law, dated respectively the 15th of April, 1872, and the 19th of October, 1874.

Those instruments were executed to carry out a sale of certain mines in *Spain* by the Plaintiff to *Henderson* and one *Partington*. The judgment was for unpaid purchase-money, and was in the nature of a real judgment against the mines in question and also a personal judgment against *Henderson* and *Partington*.

The Defendants by their statement of defence pleaded "that none of the said judgments or orders are final orders or judgments, nor is any of them an order or judgment upon which the Plaintiff's claim in the action or any part thereof can be sustained." They also set up the *Statute of Limitations*, 21 Jac. 1, c. 16. They put in a counter-claim, by which they alleged that the sale was induced by fraudulent misrepresentations, and

claimed repayment of the moneys paid by the testator in excess of the real value of the mines. Two issues were directed by order of the Court, one whether the judgment or decree of the 5th of April, 1878, and the other judgments or decrees sued upon or any of them were orders on which the claim of the Plaintiff (apart from the question of fraud) could be sustained; and the other, whether in the event of the Court being of the affirmative opinion the causes of action were barred by the *Statute of Limitations*.

The judgment of April, 1878, was pronounced in summary proceedings in a district Court of the city of *Seville*. The summary proceedings in question are called "executive." The proceedings against *Henderson* were commenced by an order made *ex parte* on the 26th of December, 1874. *Henderson* submitted to the jurisdiction of the Spanish Court, defended the proceedings, and in the result the judgment of April, 1878, was pronounced. That judgment was called a *remate* judgment. Translations of depositions of Spanish advocates taken in *Spain* were in evidence relating to the nature and effect of Spanish legal procedure.

"Executive" proceedings can be brought only in respect of certain obligations. Certain defences only can be raised in such proceedings. Notwithstanding the pendency or completion of "executive" proceedings, "ordinary" proceedings, otherwise called "plenary" or "declarative," can be prosecuted by either party in the Spanish Court. In ordinary proceedings every kind of defence can be raised; both executive and ordinary proceedings are taken in the Supreme Court; the same Judges try both kinds of actions; they are both subject to appeal, and in ordinary proceedings there is a final appeal by recourse to the Court of Cassation, but in executive proceedings there is not. The Spanish Courts execute the "*firm*" judgments of the Courts of foreign countries, where there is no treaty bearing on the subject, in the same manner as such countries recognise Spanish judgments. There was a conflict of evidence as to whether a *remate* judgment was "*firm*" in the sense used. His Lordship considered that it was. The result of the evidence as to both the facts and the nature and effect of Spanish legal proceedings more fully appear in the judgment.

This was the trial of the two issues that had been directed.

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No argument was raised on the *Statute of Limitations*, and the first issue was argued only upon the principal judgment sued upon, that of the 5th of April, 1878.

Napier Higgins, Q.C., and *Yate Lee*, for the Plaintiff:—

The principle on which a foreign judgment is enforced is clearly settled by the cases of *Schibsby* v. *Westenholz* (1) and *Godard* v. *Gray* (2). If there is an obligation to pay imposed on the party against whom the judgment is pronounced, the Courts here recognise and enforce such obligation. In this case there was a final judgment which could have been enforced in *Spain* against *Henderson*; the fact that there is an appeal actually pending against a foreign judgment is no bar to proceedings on such judgment in this country—it may be ground for staying execution or making some order, keeping the proceeds of execution *in medio*: *Hall* v. *Odber* (3): *Alivon* v. *Furnival* (4); *Scott* v. *Pilkington* (5). The fact that other proceedings can be taken to oust the judgment cannot be put on a higher footing than that the judgment is liable to appeal. The case is analogous to a judgment at law under the old practice, which could be practically superseded by a decree in Chancery.

Kenelm E. Digby, and *Davenport*, for the Defendants:—

The test of whether a foreign judgment can be sued upon is whether such judgment is final and conclusive so as to settle the merits between the parties. We may go as far as to say that a fair conclusion to be drawn from the more recent statements of the law on the subject is that the judgment is considered to have merged the original obligation, analogously to the Roman civil law: *Gaius, de obligatione* (6); *Sandars' Justinian* (7). The old doctrine that the right to sue on a foreign judgment is founded on comity of nations is exploded: *Godard* v. *Gray*. We do not dispute that the fact that a foreign judgment is liable to, or even under, appeal does not prevent it being sued upon here.

(1) Law Rep. 6 Q. B. 155.
(2) Ibid. 139.
(3) 11 East, 118, 123.
(4) 1 C. M. & R. 277.
(5) 2 B. & S. 11, 41.
(6) III. § 180.
(7) Page 66.

Nor do we dispute that a judgment at law was final; though there might be a personal equity against the creditor to restrain him from reaping the fruits of his judgment; nor that a summary judgment under Order XIV. is final. But in this case the merits could be gone into notwithstanding the *remate* judgment in the same Court, where the plea of *res judicata* could not have been raised, and it cannot be considered a final or conclusive judgment, but merely in the nature of an interlocutory order: *Story's* Conflict of Laws (1); *Plummer* v. *Woodburne* (2); *Smith* v. *Nicolls* (3); *Garcias* v. *Ricardo* (4); *Paul* v. *Roy* (5); *Berkeley* v. *Elderkin* (6); *Patrick* v. *Shedden* (7); *Frayes* v. *Worms* (8); *Harris* v. *Quine* (9).

Napier Higgins, in reply:—

Notwithstanding the mode in which Lord *Blackburn* has stated the modern doctrine, the right to sue on a foreign judgment does to some extent rest on the comity of nations: *Abouloff* v. *Oppenheimer* (10); *Piggott* on Foreign Judgments (11). The Spanish Courts do not enforce the judgments of foreign countries unless such countries have a convention, or enforce *remate* judgments in execution proceedings. The English Courts do not recognise any merger of an obligation in a foreign judgment: *Smith* v. *Nicolls*; *Piggott* on Foreign Judgments (12). The Court recognises any obligation imposed by a foreign Court or a Court of inferior jurisdiction: *Williams* v. *Jones* (13); and the judgment of the foreign Court is conclusive as to the right: *Harris* v. *Quine* (14); *Huber* v. *Steiner* (15).

1887. April 21. NORTH, J.:—

This is the trial of issues directed by Mr. Justice *Pearson* whether a certain judgment or decree dated the 5th of April,

(1) §§ 598–605.
(2) 4 B. & C. 625.
(3) 7 Scott, 147; 5 Bing. N. C. 208.
(4) 14 Sim. 265; 12 Cl. & F. 368.
(5) 15 Beav. 433.
(6) 1 E. & B. 805.
(7) 2 E. & B. 14.
(8) 10 C. B. (N.S.) 149.
(9) Law Rep. 4 Q. B. 653.
(10) 10 Q. B. D. 295, 300.
(11) 2nd Ed. p. 5.
(12) Ibid. p. 27.
(13) 13 M. & W. 628, 633.
(14) Law Rep. 4 Q. B. 653.
(15) 2 Scott, 304; 2 Bing. N. C. 202.

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1878, made by a Spanish Court of competent jurisdiction, in an order or judgment upon which the claim of the Plaintiff in this action can (apart from the question of fraud) be sustained: and if it is, then whether the *Statute of Limitations* is a good defence. It is necessary for me to state shortly the nature and object of the proceedings on which that judgment was obtained: disclaiming entirely, however, any intention of examining into the merits of that judgment. By a formal notarial deed dated the 15th of April, 1872, the Plaintiff sold and conveyed certain mines in *Spain* to two gentlemen named *Henderson* and *Partington* for £5000, and a fixed royalty per ton on all ore got. The deed also gave the purchasers the option within six months of electing to buy the mines out and out, free from royalty, for £20,000 (including the £5000): the further price to be paid by acceptances in nine monthly instalments. That deed was duly executed and registered according to the law of *Spain*, and possession of the mines sold was forthwith delivered.

The purchasers did exercise that option so given: and by another formal notarial deed dated the 19th of October, 1874, the property was conveyed to them accordingly. The balance of purchase-money then left unpaid was made payable in eight equal monthly instalments (the amounts of which were specified by the deed) by Mr. *Henderson's* acceptances: and the deed provided that if the payments were not punctually made the purchasers might be compelled thereto, and execution issue for each instalment: the mines for greater security remaining mortgaged for the exact and punctual payment of the sums agreed on. That deed also provided that if punctual payment was not made the purchasers consented to be compelled and forced by all the rigours of the law, and for the costs which might be incurred in the recovery thereof, by means of a legally authenticated copy of that deed: and appointed the city of *Seville* and its tribunals, as the place where the contract had been sanctioned, for any proceedings and notifications to which its exact fulfilment should give occasion. I may observe in passing that by this deed both parties declared that the total price fixed was the just and true value of the mines: and that they therefore renounced all actions of rescission on the ground of misrepresentation. That deed also

was duly registered: and about the same time the purchasers handed over the mines to a limited company.

Some of the draughts given for the instalments of purchase-money were duly accepted and met at maturity, but the draughts for the three latest instalments were refused acceptance and were protested accordingly. Thereupon in 1874 the Plaintiff commenced legal proceedings in the Courts of *Seville* to enforce payment of the unpaid balance. By an interlocutory order or "act" of the Court dated the 26th of December, 1874, it was ordered that an execution should be issued against the property and goods of the purchasers (the one being an inhabitant of *Glasgow*, the second of *Madrid*, but then residing in *London*) for the principal amount due with interest and costs: and that letters requisitorial should be issued by the diplomatic medium to the judicial authorities in this country to ascertain whether the debtors would pay the demand or not.

The purchaser *Henderson* appeared before the Spanish Consul in *Glasgow*, and he subsequently appointed an attorney in *Spain* to defend the action; and by such attorney he duly entered an appearance and put in his defence; such defence merely being that the Plaintiff had promised not to bring an action. Evidence was gone into on both sides in *Spain* and elsewhere; and on the 5th of April, 1878, what the official and admitted translation before me calls "the final decree" was pronounced, whereby it was ordered that the distraint (meaning the execution mentioned in the order of the 26th of December, 1874,) should be carried into effect; and directed a sale and auction of the property, and that with the proceeds full payment should be made to the Plaintiff of the amount sought in respect of his principal and interest, and the costs. And the judgment concludes with the words "And as such sentence, definitely judging the matter thus, I order, decree, and sign," and then follows the Judge's signature.

It is not disputed by the present Defendants that all these proceedings were duly and regularly taken against *Henderson* and were binding upon him. He subsequently instructed his attorney to appeal from that judgment, which the petition of appeal describes as "the final sentence pronounced in this matter"; and in accordance with the Spanish law the Plaintiff had there-

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upon to give and did give security to make good any damages *Henderson* might sustain from the execution of this judgment, if such judgment were revoked on appeal. No further steps, however, were taken by way of appeal; for a few days afterwards *Henderson* withdrew from his attorney all authority to act for him and the appeal dropped, and was never prosecuted by him.

On the 31st of December, 1880, *Henderson* died; and the Defendants are his executors; and on the 12th of May, 1883, the Plaintiff commenced the present action against them founded upon the judgment of the 5th of April, 1878, to recover the balance still due thereon to him. As the action was brought within six years of that judgment I may say at once that if the judgment gives the Plaintiff a good cause of action the *Statute of Limitations* is no defence to it.

The point on which the Defendants rely in answer to the Plaintiff's case is that such judgment is not a final and conclusive judgment; and therefore is not of such character or quality as to give a cause of action in this country, or constitute a judgment which the Courts here will enforce. The Defendants also plead in this action that the execution of the said notarial deed was obtained by fraudulent misrepresentation: and seek by counterclaim not to have the deed set aside and the purchase-money repaid and the property restored to the Plaintiff—but to have repayment by the Plaintiff of the amount by which the purchase-money exceeds the net value of the property. But as the question of fraud is eliminated from the issues now before me I do not refer to it further.

In order to decide whether the judgment above mentioned is or is not final and conclusive it is necessary to consider the law of, and procedure in, *Spain* as disclosed in the evidence before me.

According to that law proceedings are of two kinds: "summary" or "executive" proceedings: and "plenary," also called "declaratory" or "ordinary" proceedings. The object of the former is to enable creditors and others to enforce their claims by short and expeditious means, when certain determined conditions exist. It is dictated by the same policy which in this country authorized summary applications for judgment with respect to bills of exchange, and also under Order XIV. under the

Judicature Act, viz., the expediency of providing a prompt and ready remedy in commercial cases, and frustrating the attempts of debtors to avoid or postpone, by frivolous or fictitious defences and protracted litigation, the payment of their just debts. This summary procedure may be resorted to in numerous cases, and even with respect to immoveable as well as to moveable property, and (among others) in cases where a debt is shewn to exist by an acknowledgment before a competent Judge, or by any public document executed by the debtor; and it is not disputed that the agreement to pay contained in the notarial deed of October, 1872, was a sufficient basis for summary proceedings to enforce payment. Upon the production of such proof to the Judge he, without notice to the debtor, makes an order for execution against the defendant by attaching his property. This is an interlocutory order, or "act," and corresponds with the order made in this case on the 26th day of December, 1874. But such an order is not a judgment upon which the Plaintiff could have brought an action in this country. Notice of this attachment is then given to the debtor; and he is cited to appear, and has the opportunity of appearing to the action, and putting in his defence. It is not every defence, however, which is open to him; certain pleas, or exceptions, only are admissible. He can plead payment, want of jurisdiction, and many other defences referred to in the evidence, but he cannot set up any defences which challenge the contract itself, the validity of which the law assumes in summary proceedings. It is not open for him to allege, for instance, that he was induced to sign the contract by fraudulent misrepresentation. When the pleadings are completed evidence is taken, and the Court decides the case; and the Judge has only three courses open to him. He can annul the proceedings on the ground of any irregularity, or give judgment for the defendant; but if the plaintiff is in the right, both as to form and merits, the Court pronounces a "*remate*," or "closing," judgment, directing that the execution is to issue: and this completes and closes the summary judicial proceeding, and is final and decisive in that proceeding, unless altered on appeal. There is some difference between the witnesses as to whether such "*remate*" judgment is a "*firm*" judgment or not: but that point appears to me concluded by a

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judgment produced in evidence of the Spanish Court of Appeal in July, 1885, in which this "*remate*" judgment is styled a "*firm*" judgment; which is as good evidence as can be had of what is the law of *Spain* on the subject. After such judgment nothing remains to be done. The defendant can appeal to the superior Court; but even then there can be no stay of execution if the plaintiff gives security to the defendant to make good all loss he has sustained by the execution, in the event of the judgment being reversed. The Judge clearly has no power of suspending the execution, no discretion to prevent its issuing and being completed as a matter of course. I should add that in summary proceedings though there is an appeal to the Court of Appeal, there is none to the Supreme Court, or Court of Cassation.

If, however, the Defendant has a good answer to the claim of the Plaintiff, which is not available by way of defence in the summary proceeding, he is not without remedy. It is open to him at any time, either before the beginning of, or pending, or after the close of, the summary proceeding, to commence an ordinary or plenary proceeding of his own; and in this every legal answer to his opponent's claim is available: and he can set up the case that the instrument upon which he may be sued by summary process was obtained by fraud, deception, or error, and seek to have it set aside. In such an action no plea can be set up of *res judicata* founded on a judgment obtained in a summary action; or, to adopt the language of all the Spanish witnesses, there can be no exception of a matter decided. In the plenary action also any points already set up, even unsuccessfully, by a defendant in the summary action may be again set up and relied on. It is unnecessary to consider the intermediate steps in such a proceeding, as none such was ever commenced by *Henderson* or his executors before the writ in this action was issued. It is necessary, however, to bear in mind that the summary and plenary proceedings are separate proceedings, quite distinct in their nature, regulated by different rules, and cannot in any way be dealt with together, or consolidated.

It is most important, however, to consider the effect of the ultimate judgment in the plenary proceedings. All the witnesses are agreed that if *Henderson*, against whom the *remate* judgment

was obtained, had commenced and successfully prosecuted plenary proceedings to have the notarial deeds set aside as obtained by fraud, and had recovered judgment therein accordingly, the *remate* judgment would thenceforth have been inoperative if still incomplete; and if and so far as it had been completed the Plaintiff *Nouvion* would have had to return to *Henderson* what he had received, and indemnify him against losses sustained by the execution. What is the exact operation of such plenary judgment on the summary judgment the witnesses do not define accurately: but that it does to some extent displace it, and prevent its having further operation after the date of the *firm* plenary judgment, is clear. Some of the witnesses speak as though the plenary judgment affected the summary judgment in the same manner as a judgment of the Court of Appeal in the summary proceedings would have done. Others again say that an appeal only can revoke a summary judgment, and that a plenary judgment has not that effect. The conclusion at which I have arrived, after careful consideration of the evidence, is that the latter is the true view; and that if the *remate* judgment be likened to a judgment for the Plaintiff *Nouvion* in an action in the Court of Exchequer on a bond, a judgment in favour of *Henderson* in a plenary proceeding to have the bond set aside as improperly obtained, and all proceedings thereon stayed, would correspond, not with a successful appeal from the judgment below to the Court of Exchequer Chamber, but with a judgment in a suit on the Equity side of the Exchequer, declaring the invalidity and directing the cancellation of the bond, and staying all proceedings to execute the judgment. But I do not think it necessary to press this comparison further, as I cannot put the case more favourably to the Defendants than by assuming that the effect of a *firm* plenary judgment when obtained would be the same as that of a successful appeal upon the summary judgment. All witnesses agree that the *remate* judgment and the execution thereon, if unappealed from, cannot be modified, suspended, or stayed by anything less than *firm* final judgment in a plenary proceeding.

The question now is whether an action can be brought in this country upon a Spanish *remate* judgment admitted to have been

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obtained regularly in every respect as against *Henderson*, an appeal from which was brought but abandoned: and the validity of which judgment, and of the notarial deeds upon the basis of which such judgment was obtained, had not, at the time when this action was brought, ever been challenged by *Henderson* or his executors, none of whom had ever initiated any plenary proceeding to avoid the effect of those deeds or the *remate* judgment thereon.

It struck me at one time that the judgment of the 5th of April, 1878, merely directed execution to issue against *Henderson's* goods, and did not amount to a personal judgment against him for payment, but this difficulty is removed by the evidence, as all the witnesses on both sides agree that the effect of that *remate* judgment was, according to the law of *Spain*, to make *Henderson* personally, and his estate in the hands of his executors, responsible for the payment of principal, interest, and costs.

To deal properly with the defence that, as the *remate* judgment in a summary proceeding may be displaced by a plenary judgment, the former is not final and conclusive in *Spain*, and therefore does not constitute a good cause of action here, it is necessary to consider upon what principle the Courts of this country enforce the judgments of foreign Courts. In the well-known case of *Godard* v. *Gray* (1) Lord *Blackburn* laid down the law thus (2):—

"In *England* and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by *Parke*, B., in *Williams* v. *Jones* (3): 'Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced.' And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defen-

(1) Law Rep. 6 Q. B. 139. (2) Law Rep. 6 Q. B. 148. (3) 13 M. & W. 628.

dant to shew that the Court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may shew that the judgment was obtained by the fraud of the plaintiff."

Again in *Schibsby* v. *Westenholz* (1) Lord *Blackburn* says: "It is unnecessary to repeat again what we have already said in *Godard* v. *Gray* (2). We think that, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in *England* is that stated by *Parke*, B., in *Russell* v. *Smyth* (3), and again repeated by him in *Williams* v. *Jones* (4), that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action." These cases clearly state the principle in a way which is binding upon me, and I consider myself bound to act upon and follow them, notwithstanding the doubt thrown out by Lord *Coleridge* in *Abouloff* v. *Oppenheimer* (5) as to whether the principle is accurately stated there or not.

The jurisdiction of the Spanish Courts over *Henderson* in the summary proceedings being clear, and not in dispute, did the *remate* judgment in question impose upon him a duty or obligation to pay the sum adjudicated to be due? I am of opinion that it did create such a duty or obligation, and did therefore give a right, or create a cause, of action; though it no doubt left it open to the Defendants to set up by way of defence anything which negatived the existence of such duty or obligation, or excused them from the performance of it. This, however, is not material for the present purpose, as what I have to decide on the present issue is merely whether the action will lie—not whether it can be successfully defended.

(1) Law Rep. 6 Q. B. 159.
(2) Ibid. 139.
(3) 9 M. & W. 810, 819.
(4) 13 M. & W. 633.
(5) 10 Q. B. D. 300.

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The *remate* judgment, final and conclusive in *Spain* in an action in which some defences only can be set up, does not correspond exactly with anything found in the legal procedure of this country. Some things, however, which are not without bearing upon the question are clear by English law. Its finality is not affected by the fact that an appeal will lie from such judgment to a superior Court in *Spain*; although the pendency of such an appeal might induce the Court here to stay execution on a judgment recovered in this country in an action on the foreign judgment the subject of such appeal: see *Hall* v. *Odber* (1); *Alivon* v. *Furnival* (2); *Scott* v. *Pilkington* (3); *Henderson* v. *Henderson* (4). Again, the fact that it was recovered in a summary process would not affect its finality; for instance, a judgment for payment of money which would have been final and conclusive if given on the trial of an action in the ordinary way would not be less so if recovered on an application under Order XIV. Again, the finality of the summary judgment in favour of the plaintiff would be unaffected by the fact that, if it were subsequently avoided after execution by a plenary judgment, the plaintiff would have to make good to the defendant what the plaintiff had recovered under such judgment—just as a judgment of the Court of Queen's Bench has always been treated as final, notwithstanding that, if it were reversed on appeal, the defendant would have been entitled to a writ of restitution.

Several authorities were cited by Mr. *Digby* on behalf of the Defendants to shew in what cases a judgment would not be final and conclusive—for instance *Plummer* v. *Woodburne* (5), where the question was one of pleading only. In an action on the case at *St. Christopher* judgment was given for the defendant. The plaintiff afterwards sued him here for the same cause of action—the defendant pleaded the judgment in the other action, but unsuccessfully, as it was not averred that the judgment was final and conclusive at *St. Christopher*, and it was quite consistent with the plea that the judgment was merely in the nature of a nonsuit, and therefore no bar to another action by the plaintiff for

(1) 11 East, 118.
(2) 1 C. M. & R. 277.
(3) 2 B. & S. 41.
(4) 3 Hare, 100.
(5) 4 B. & C. 625.

the same matter. *Frayes* v. *Worms* (1) was a similar case, and the observations on this point in *Smith* v. *Nicolls* (2) are to the same effect. On similar grounds a plea in a suit in Chancery was held bad by Vice-Chancellor *Shadwell* in *Garcias* v. *Ricardo* (3), though this decision was reversed in the House of Lords (4). In *Ostell* v. *Lepage* (5) a judgment, dissolving a partnership and directing accounts which were still pending, was held not to be final. In *Paul* v. *Roy* (6) two trustees having misapplied a fund were ordered jointly and severally by the Court of Session to place the sum *in medio* in the bank pending the trial. *Paul* paid in the whole, and then sued *Roy* (who was in *England*) to compel him to pay the whole of the sum so paid by *Paul*, or some part of it. This obviously was not an action to enforce a judgment; for the order of the Court had been satisfied; it was merely a suit to have decided here questions which had not yet risen, and would properly arise at a future time in the Court of Session. Moreover the order for payment into the bank was merely securing the amount, and not adjudicating on any right respecting it, and the Master of the Rolls remarked (7): "It has not been questioned, and I have no doubt, that this Court has jurisdiction to enforce a foreign judgment; and, in ordinary cases, when the parties to them are here, to enforce the rights and obligations arising out of contracts entered into in foreign countries. But the first question to be considered is, whether this is a final foreign judgment adjudicating on the rights of the parties litigant here; because, I conceive, it would be new in practice for this Court to enforce a foreign judgment, unless it were final and conclusive. I have not found, nor have I been referred to, any case in which this Court has ever given effect to an interlocutory order, and which therefore may be varied by the subsequent proceedings in the cause. If a final order had been made to pay a sum of money, I cannot doubt that the Courts of this country would compel the debtors, residing here, to pay the judgment creditor." In *Patrick* v. *Shedden* (8) the circumstances were as follows: An action had been brought in *Scotland* by

(1) 10 C. B. (N.S.) 149.
(2) 5 Bing. N. C. 208.
(3) 14 Sim. 265.
(4) 12 Cl. & F. 368.
(5) 5 De G. & Sm. 95.
(6) 15 Beav. 433.
(7) Ibid. 439.
(8) 2 E. & B. 14.

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Shedden against *Patrick*, which resulted in a judgment for the defendant with costs. *Shedden* appealed to the House of Lords; and this would in itself formerly have prevented the issue of execution. But by an Act of *George* III. the Court of Session was authorized, pending an appeal to the House of Lords, to regulate all matters relative to interim possession or execution and payment of costs and expenses already incurred according to their sound discretion. Under that Act the Court of Session allowed execution to proceed for costs subject to caution to repay the same if the judgment were reversed in the House of Lords. *Patrick* accordingly brought an action in *England* against *Shedden* for such costs; and it was held that such action would not lie, as the order was a mere interim order, capable of being varied by the Scotch Court at any time before the decision on the appeal. In *Berkeley* v. *Elderkin* (1) an action was brought on a County Court judgment; and it was held that such action would not lie for two reasons, first, because the *County Court Acts* conferred special rights and remedies as to the property and person of the debtor which would be defeated if it were held that an action would lie in a superior Court on the judgment; and, secondly, because the order was not a final order, and could be rescinded or altered from time to time by the Judge who made it; and this was the point for which the case was cited; and Mr. *Digby's* argument founded upon it was that, as the *remate* judgment might be varied by a plenary judgment made by the same Judge who pronounced the summary judgment, the *remate* judgment could not be final. But to that argument there are two answers. The first is that *Berkeley* v. *Elderkin* is not an authority in support of the proposition for which it was cited. In the later case of *Austin* v. *Mills* (2), to which counsel did not refer, two questions arose: first, whether an action would lie in a superior Court on a judgment in a County Court; and secondly, whether such judgment could be pleaded in bar to another action on the original cause of action. The Court held, first, that no action would lie on such judgment, following *Berkeley* v. *Elderkin*; and, secondly, that the County Court judgment was final and a bar to a fresh action on the original consideration. The Chief Baron *Pollock*, who gave

(1) 1 E. & B. 805. (2) 9 Ex. 288.

the judgment of the Court, said (1): "It was then contended, that the judgment in the County Court was no bar to an action for the original consideration. It was not disputed that a final judgment in an inferior Court, for any cause of action, was a bar to a suit in any other Court for the same cause; but it was argued, that the judgment of the County Court was not final, and therefore no bar to such a suit, because it was competent for the County Court Judge to vary it afterwards, by virtue of the 100th section; and expressions at the close of Lord *Campbell's* judgment in *Berkeley* v. *Elderkin* (2) to that effect were made use of, on the argument before us, to shew that his Lordship was of that opinion. But we think that the expressions of Lord *Campbell* have been mistaken. We do not understand his Lordship to mean that the judgment was not final, in the sense that it was in the nature of an interlocutory judgment. We think that it is a final and complete decision of the case in the County Court, and consequently that the question whether the debt recovered was due, cannot be again litigated in any other Court."

The difference between the two cases is, in my opinion, more apparent than real. I think the County Court judgment clearly is final and conclusive upon the question whether the plaintiff's claim is well founded or not, and that the Judge cannot subsequently, either under sect. 100 or otherwise, rescind or alter, or even reconsider his judgment on the merits; but that such section does give him a large discretion and control as to the manner in which the judgment is to be enforced.

The second answer to Mr. *Digby's* argument is that, whatever a County Court judgment may be, all the witnesses agree that a *remate* judgment is final and conclusive, so far as that proceeding is concerned; and the Judge has no power whatever to rescind or alter the order, nor even to stay execution thereunder. None of the cases to which I have referred is an authority that such a judgment on the merits is not final and conclusive. And the only question is whether, apart from authority, the possibility of such avoidance of the *remate* judgment as a plenary judgment can effect renders the former incapable of enforcement by action, by reason of non-finality.

(1) 9 Ex. 293. (2) 1 E. & B. 805.

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Suppose that the whole transaction had been English, before the passing of the *Judicature Act*, and that *Nouvion* had brought his action in the Court of Queen's Bench for the unpaid instalments of purchase-money, and recovered judgment thereon; and that subsequently *Henderson* had filed a bill in Chancery to have the contract and deeds set aside on the ground of fraudulent misrepresentation, and had succeeded in obtaining a decree to that effect, and an injunction to restrain execution on the judgment at law; such relief would be as wide as any which a plenary judgment could give against a *remate* judgment; and yet it is quite clear that though the judgment at law could not be set up as a defence of *res judicata* in the suit in Equity it still would be a final and conclusive judgment, and a good foundation for an action upon it. The cases also resemble one another in this, that the plea of misrepresentation is not set up by way of defence to the action, but is made the subject of a separate proceeding. In *England* fraud might be set up as a legal defence to an action on the covenant to pay; but it need not be so set up; and the fact that it might have been, but was not, pleaded as a defence in the action at law, would not prevent the plaintiff in Equity from obtaining on that ground relief against the judgment. I hold, therefore, that the *remate* judgment did impose a duty or obligation on *Henderson* to pay the sum for which judgment was given unless he can negative the existence of such obligation, or establish some legal excuse for not performing it; and did therefore give a good cause of action. I do not see how I could come to an opposite conclusion without holding that no judgment of any Court of Common Law before the *Judicature Act* could have been final; as any such judgment might have been rendered of no effect by a decree of a Court of Equity staying all proceedings under it.

Of course I merely decide that the action will lie—the question whether it can be successfully defended is not now before me. Whether *Henderson* and his executors, who have for twelve years retained the mines without taking any proceedings to set aside the deed, and who now do not seek to rescind the contract, but merely to have the purchase-money reduced, are entitled to succeed, is a question for the trial. It will be unfortunate for the

Plaintiff if they can; for he, having relied on his judgment, has allowed the time to elapse within which he could bring an action here on the original consideration; and the statute would now be a bar to such an action.

I have hitherto abstained from mentioning the fact, that, on the 5th of May, 1884, a year after the writ in this action was issued, *Henderson's* executors did commence a plenary action in *Spain* impeaching the notarial deed; which proceedings are still pending. I passed it by, because it could not affect the question whether the Plaintiff had a good cause of action when he issued his writ. It was on an interlocutory application in that action that the order of July, 1885, to which I have referred, was made.

The first issue now being tried relates in terms not only to the judgment of the 5th of April, 1878, but also to certain other judgments or decrees, of which particulars are alleged to have been delivered. None of these matters have been gone into before me. I have been told that they do not go to the root of the action; but merely affect, or may affect, the amount which the Plaintiff will recover if the action is successful. They also, I am told, involve considerations differing from those discussed before me; and, with the consent of counsel, I abstain from referring further to them.

I may say in conclusion, that I am glad to be able to see my way to holding the above judgment to give a good cause of action: as it appears from the evidence that the Spanish Courts carry into effect the judgments of those countries only which give effect to *firm* judgments issuing from Spanish Courts.

My finding on the issues is that the judgment or decree of the 5th of April, 1878, referred to in the amended statement of claim, is a judgment upon which the claim of the Plaintiff in this action can (apart from the question of fraud) be sustained: and that the cause of action in respect of such judgment is not barred by the *Statute of Limitations.*

The costs of the Plaintiff and Defendants of these issues will be costs in the action.

Solicitors: *Ewbank & Partington*; *Freeman & Bothamley.*

D. P.

NORTH, J.
1887
April 29;
May 2.

In re POSTLETHWAITE.
In re RICKMAN.
POSTLETHWAITE *v.* RICKMAN.

[1886. P. 2854.]

Discovery—Production of Documents—Privilege—Fraud—Trustee.

An action was brought for an account of profits in respect of a purchase of trust property, on allegations that the sale was secretly made for the benefit of *R.*, one of the trustees, with the connivance of *T.*, another trustee who was a solicitor. The representatives of *R.* claimed privilege from production for letters from *T.* to *R.* and for *T.*'s bill of costs, on the ground that the communications were made by *T.* acting as solicitor to *R.* in his private capacity. Production was ordered because the communications passed between two trustees, and because the solicitor and his client were charged with fraud.

JOSEPH LEGG POSTLETHWAITE, William Charles Rickman, and *John Joseph Tourle* were the trustees of the will of *William Postlethwaite,* deceased. *Joseph Legg Postlethwaite* was beneficially interested in the proceeds of sale of the testator's residuary real and personal estate. *Joseph Legg Postlethwaite* was now dead. The Plaintiffs were his three children, and were entitled to his interest under the will of *William Postlethwaite. William Charles Rickman* was also dead; the Defendants were his executors and *John Joseph Tourle,* the surviving trustee of the will of *William Postlethwaite.*

The statement of claim alleged that a portion of the testator's estate had been sold to one *James Walker,* who was acting as trustee for *William Charles Rickman,* and was put forward by the latter for the purpose of concealing from *Joseph Legg Postlethwaite* and others interested in the estate that *William Charles Rickman* was the real purchaser; that the Defendant *Tourle* had acted as the solicitor for himself and his co-trustee in winding up the estate, and that *William Charles Rickman* had made large profits in re-selling the trust property bought for him. The Plaintiffs sought to make the estate of *William Charles Rickman* and the Defendant *Tourle* liable for such profits.

The Defendants, the executors of *William Charles Rickman*, alleged in their statement of defence that the sale to *Walker* was made *bonâ fide*, and that their testator had subsequently bought from *Walker*. They had made an affidavit of documents, including a number of letters written by the Defendant *Tourle* to their testator, and the bills of costs of the Defendant *Tourle*. They claimed privilege from producing these on the ground that they were professional communications of a confidential character between their testator and the Defendant *Tourle*, who in such communications acted professionally for their testator, and as his private solicitor, and not as solicitor for the trust, and were charged to and paid for by him out of his own money.

This was a summons on the part of the Plaintiffs to compel the production of those documents.

Cookson, Q.C., and *A. àBeckett Terrell*, for the Plaintiffs:—

From the nature of the case the communications for which privilege is set up, which took place between two trustees, must have related to the trust. The beneficiaries have therefore the right to know what they contain, though the trustees may have paid for them personally: *Talbot* v *Marshfield* (1).

Again, the relief claimed is grounded on fraud participated in, as is alleged, by the solicitor who gave the advice. The persons charged cannot use the privilege to protect themselves from the discovery of the fraud: *Greenough* v. *Gaskell* (2); *Follett* v. *Jefferyes* (3); *Reg.* v. *Cox* (4).

Cozens-Hardy, Q.C., and *Rowden*, for *Rickman's* executors:—

The Court will not go behind the affidavit of documents. It is sworn that the communications were made for the purpose of advising Mr. *Rickman* in his private capacity. The advice was not required for the purpose of the trust, and the beneficiaries can have no right to see them. In *Talbot* v. *Marshfield* the trustee had, as trustee, taken an opinion. The opinion there belonged to the trust.

(1) 2 Dr. & Sm. 549.
(2) 1 My. & K. 98, 103.
(3) 1 Sim. (N.S.) 3.
(4) 14 Q. B. D. 153, 167.

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The right of beneficiaries to set aside a sale to a trustee is not founded on fraud. The cases with respect to fraud do not apply.

A. à Beckett Terrell, in reply.

[By the consent of the Respondents the documents for which privilege was claimed were submitted to the Judge for his perusal.]

1887. May 2. NORTH, J. (after stating the facts, the allegations made by the statement of claim, and the nature of the relief asked, and referring to the Defendants' affidavit of documents, continued):—

The Defendants object to produce certain letters and copies of letters and correspondence between *Tourle* and *Rickman* in the years 1853 and 1854, and two bills of costs, on the ground that they were privileged. It is said that in that correspondence *Tourle* was acting as the private solicitor of *Rickman* and not as the solicitor of the trustees, and that those communications were paid for by *Rickman* personally out of his own moneys, and were made with the object of enabling him to procure legal advice and assistance as a private individual, and not as a trustee of the testator's will. And it is said that the bills of costs were prepared by *Tourle* in his private capacity, acting professionally for *Rickman* as a private individual and at his expense, and that they contained professional communications of a confidential character between *Rickman* and *Tourle*.

It seems to me that these documents ought to be produced, and on three grounds. In the first place, looking at the case made by the statement of claim (whether it will be proved or not I do not know, and I assume that it is true only for the purpose of deciding the present question), I think that when a scheme is devised by two out of three trustees that one of the two shall purchase part of the trust estate in the name of a third party, and that this shall be concealed from the third trustee, so that the *cestuis que trust* may know nothing about it, no professional privilege can avail to protect from production any correspondence relating to such a transaction as that. The case of *Follett* v.

Jefferyes (1) is very much in point. In that case Lord *Cranworth*, V.C., held that the transaction which was impeached by the bill was not, according to the account of it given in the bill and answer, a fraud, and that, therefore, the defendant was not bound to set forth the contents of certain letters which had passed between herself and her solicitor. But Lord *Cranworth*, in his judgment, said (2): "This is the account of the transaction, as stated both in the bill and the answer; and, in my opinion, this was not a fraud according to any definition of fraud which can be recognised in this Court. The transaction, as stated on this bill, is one as to which it was perfectly lawful for the client to ask, and for the solicitor to give professional advice. And this seems to me to be the true test, in a case like the present, as to whether what has passed is or is not privileged."

And a little earlier he had said (3): "The single question, therefore, on which I have to decide, is . . . whether the plaintiffs have now, on the amended bill, made a special case connecting the discovery sought with the fraudulent act complained of, so as to take the case out of the ordinary rule. I think they have not. For such a purpose, it is essential that the act complained of, should, on the face of the bill, appear to be a fraud. Such was the case of *Reynell* v. *Sprye* (4). There, the client penned a letter to be copied and sent to him by the attorney, as if emanating from the attorney himself, with a view to its being shewn to the plaintiff, so as to lead him to sell his estate at an undervalue. Lord *Langdale* held that there was no privilege protecting the client or the attorney from producing this letter. So, in the present case, if the annuity had been forfeitable, not on any assignment or attempt to assign, but only on an assignment by way of sale, and the solicitor had been party, with *Taylor*, to a scheme for framing a deed which should purport to be, but should not, in truth, be, a sale; *that* would be a fraud, and both client and solicitor would be bound to discover all which had passed, between them, in reference to the preparation of such a deed. So, again, if the forfeiture had been made to depend on the assignment having been made before a particular date, and

(1) 1 Sim. (N.S.) 3.
(2) Ibid. 16.
(3) 1 Sim. (N.S.) 15, 16.
(4) 10 Beav. 51; 11 Beav. 618.

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the solicitor had been party to a plan for getting the deed antedated: and many similar cases may be suggested."

The case which Lord *Cranworth* put there by way of illustration is very similar to the case which is actually alleged by the Plaintiffs in the present action, *i.e.*, the existence of an arrangement between two trustees, one of whom was the solicitor of his co-trustees, which should have the effect of representing to the *cestuis que trust* that that was a sale which in truth was not a sale of the trust property. Again, in *Russell* v. *Jackson* (1), Vice-Chancellor *Turner* said (2): "Can it then be said that the communication should be protected because it may lead to the disclosure of an illegal purpose? I think that it cannot; and that evidence which would otherwise be admissible, cannot be rejected upon such a ground. On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law."

Both those cases are of very high authority, and they both received the approval of the full Court for Crown Cases Reserved in *Reg.* v. *Cox* (3). It seems to me, therefore, that if the case alleged by the statement of claim be true, there can be no professional privilege for the documents in question.

But, in the second place, *Rickman* and *Tourle* were acting together in relation to the trust estate. *Tourle* was himself one of the trustees, and he was the solicitor of all the trustees, and he also, in some totally independent matters, acted as *Rickman's* solicitor. In my opinion it is not open to trustees to act together in such a way—the one acting as the professional adviser of the other—as to close the mouth of either of them in regard to matters relevant to the trust. If they do so act, they must take the consequence of that which they had done not being treated as privileged. The difficulty of holding that privi-

(1) 9 Hare, 387. (2) 9 Hare, 392.

(3) 14 Q. B. D. 153.

lege existed in such a case would be very great. Suppose that one of the *cestuis que trust* had made an assignment of his interest in the trust property of which notice had been given only to one of the trustees—*Rickman*. Suppose that no notice had been given by the assignee to *Tourle*, but that he had been informed of the assignment by *Rickman* when he was acting as *Rickman's* solicitor; could he decline to answer whether he had received notice on the ground that he was acting as *Rickman's* solicitor? In my opinion he could not, but the notice which he had received would have been received by him in his character of trustee, and he would be bound to disclose it. If two trustees acted together, not fraudulently, but unfairly to their *cestui que trust*, I think it would be a novel doctrine to say that they had a right to keep within their own bosoms that which they had done because one of them was acting as solicitor for the other.

The third ground is one which is peculiar to the present case. The executors, by their defence, deny that *Walker* was acting as a trustee for *Rickman* for the purpose of concealing the fact that he was the purchaser from the *cestuis que trust*. Adopting this as a true statement, it amounts to this, that what was done by *Rickman* and *Tourle*, before the sale to *Walker*, was done by them as co-vendors of the property to him, and not because *Rickman* had any independent interest by reason of a purchase from *Walker*. If this be so, what ground is there for saying that any relation of solicitor and client existed between *Rickman* and *Tourle* which can confer any professional privilege upon the communications between them? I think the statements in the executors' defence put them out of Court. I therefore must order the production of these documents. With the consent of the counsel on both sides I have looked at the documents, and from what I have seen of them I think it clear that they ought to be produced. But the Defendants will have liberty to seal up such parts as are not relevant to the matters in question in this action.

Solicitor for Plaintiffs: *Thomas Edwards.*
Solicitors for executors: *Randall & Bucknill.*

D. P.

STIRLING, J.

1887

May, 21, 25; *June* 11.

In re HASTIE'S TRUSTS.

Will—Bequest—Future Illegitimate Children to be in esse at the Death of the Testator.

H. by his will gave a trust fund "in trust for my four natural children by *M. E. M.*, viz., *J.*, *C.*, *E.* and *J. H.*, and all and every other children and child which may be born of the said *M. E. M.* previous to and of which she may be pregnant at the time of my death, share and share alike." Besides the four children named in the will there were three other children born of *M. E. M.* after the date of the will and before the death of the testator, all of whom were known by his surname:—

Held, (1), that upon the construction of the will the word "children" must be taken to include illegitimate children, and was not void for uncertainty; and (2) that being a gift by will to illegitimate children of the testator to be *in esse* before the death of the testator, it was a good gift within the rule laid down in *Occleston* v. *Fullalove* (1), and that the children who came into *esse* after the date of the will and before the death of the testator were entitled to share in the gift.

PETITION.

James Hastie, of *Calcutta*, by will dated in July, 1838, devised and bequeathed his real and personal estate upon trust for sale and conversion, and directed his trustees to set apart a sum of money, the interest of which when invested in certain securities would produce £100 a year, and out of the interest and capital of this sum to "pay to *Martha Eliza Macdaniell*, who is and has for some time past been cohabiting with me, and is the mother of the children hereinafter named, for her and their own benefit so long as she shall live or until she shall marry" the annual sum of £100; provided that in case she should marry the bequest of the annuity of £100 a year should be revoked and the moneys set apart for the same should sink into the residue of his estate, and instead thereof the testator gave the said *M. E. Macdaniell* £500 for her separate use. The testator then directed his trustees to invest the residue of the proceeds of his real and personal estate and to stand possessed of the trust fund "in trust for my four natural children by the said *Martha Eliza Macdaniell*, viz.,

(1) Law Rep. 9 Ch. 147.

James, Charles, Emma, and *Jessie Hastie,* and all and every other children and child which may be born of the said *Martha Eliza Macdaniell* previous to and of which she may be pregnant at the time of my death, to be divided equally between and amongst them, share and share alike," the shares of daughters to vest at the age of twenty-one or marriage, and the shares of sons to vest at twenty-one; and the testator declared that "until the vesting or payment of the portions hereby provided for my said natural children respectively as aforesaid," the trustees should have certain powers for the maintenance and education "of the said children," and the will contained a gift over in case "all of them the said children, *James, Charles, Emma,* and *Jessie Hastie,* and all and every other the children and child which may be born of the said *Martha Eliza Macdaniell* previous to, and of which she may be pregnant at the time of my death" should die before they or some or one of them should have taken a vested interest under the will.

The testator died unmarried, in April, 1848, and the connection between him and *M. E. Macdaniell* subsisted down to the time of his death. Besides the four children mentioned in the will, there were three other children born of *M. E. Macdaniell* after the date of the will and before the death of the testator, all of whom were illegitimate, and were known by the surname of the testator. The trustees of the will set apart and invested a sum of money to answer the annuity given to *M. E. Macdaniell,* and under a deed of family arrangement divided the residue of the testator's estate. *M. E. Macdaniell* died in January, 1857, without having been married. The trustees of the will then paid the fund set apart to answer the annuity into Court; and upon this petition for the payment out of the fund the question was whether the three afterborn children were entitled to take under the gift in the will.

Hastings, Q.C., and *MacSwinney,* for the Petitioner, who was one of the children born after the date of the will:—

The testator could not have contemplated the marriage of *M. E. Macdaniell* and the birth of legitimate or illegitimate children to her by another man during his own life, and his

STIRLING, J. 1887 *In re* HASTIE'S TRUSTS.

intention upon the face of the will was to provide for his own illegitimate children by her. So the word "children" should be read "illegitimate children," and the gift is not void for uncertainty. This is not the case of a provision by deed, but of a provision by will, and as a will only takes effect at the death of the testator, there is nothing contrary to public policy in a gift by will to such illegitimate children of a woman as may be born or be *in esse* at the death of the testator. The children born after the date of the will in this case are accordingly entitled to share in the property: *Occleston* v. *Fullalove* (1); *Pratt* v. *Mathew* (2).

Grosvenor Woods, for the trustee in the first bankruptcy of *James Hastie*, one of the four children named in the will:—

A provision for future illegitimate children is *contrâ bonos mores*, and not the less so when it is made by will.

In *Haworth* v. *Mills* (3), where a single woman who had gone through the ceremony of marriage with her deceased sister's husband, made a bequest in favour of her children, legitimate or illegitimate, and had one child living at the date of the will and several born afterwards, it was held by *Page Wood*, V.C., that the after-born children could not take. Upon this will it does not appear with certainty that the after-born illegitimate children are the persons meant by the word "children." But if so, "every gift to an illegitimate child, the begetting of which is contemplated, is against the policy of the law:" *Holt* v. *Sindrey* (4). In *Occleston* v. *Fullalove* the Court was not unanimous, Lord *Selborne* differed from Lords Justices *James* and *Mellish*. And it is still the rule that a man cannot make a valid gift by will to his future illegitimate child: *In re Ayles' Trusts* (5); *In re Bolton* (6). The latter case shews it to be doubtful whether the Court would now carry *Occleston* v. *Fullalove* to its full extent, and it cannot now be considered a satisfactory authority. If *M. E. Macdaniell* had married, her legitimate children would have been entitled under the will, and the Court cannot construe it so as to include both legitimate and illegitimate children.

(1) Law Rep. 9 Ch. 147.
(2) 22 Beav. 328.
(3) Law Rep. 2 Eq. 389.
(4) Law Rep. 7 Eq. 170, 176.
(5) 1 Ch. D. 282.
(6) 31 Ch. D. 542, 550.

Montague Shearman, for the trustee in a later bankruptcy of *James Hastie*:—

The plain meaning of the will is to give to any child, legitimate or illegitimate, and if so the after-born illegitimate children cannot take under it.

Lemon, for two daughters of *James Hastie* and one son of *Charles Hastie*:—

The word "children" used in a will *primâ facie* means legitimate children, no other meaning can be attributed to it by conjecture: *Hill* v. *Crook* (1); and there is not on the face of this will enough to establish any other application of the word. In *Crook* v. *Hill* (2) the illegitimate child allowed to take was *en ventre sa mère* at the date of the will; but a prospective gift by will to future illegitimate children of a woman is void: *Medworth* v. *Pope* (3).

H. R. Williams, for the trustees of the marriage settlement of the testator's daughter *Jessie*.

Greenwood, for the executor of the testator's daughter *Emma*.

E. W. Byrne, for the trustees of the will.

Hastings, in reply:—

In the present state of the law a gift to future illegitimate children who must come into existence before the gift can take effect is good.

1887. June 11. STIRLING, J.:—

The first question here is, what is the meaning of the words "children and child" in the gifts to "all and every other children and child which may be born of the said *Martha Eliza Macdaniell* previous to and of which she may be pregnant at the time of my death." The rule is stated by Lord *Cairns* in *Hill* v. *Crook* as follows (4): "What appears to me to be the principle which may fairly be extracted from the cases upon this subject

(1) Law Rep. 6 H. L. 265.
(2) 3 Ch. D. 773.
(3) 27 Beav. 71.
(4) Law Rep. 6 H. L. 282.

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is this—the term 'children' in a will *primâ facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *primâ facie* interpretation is departed from." The first class I need not refer to. "The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." The rest of the judgment shews that in each case all the circumstances are to be taken into consideration. In the present case the testator recognises the connection existing between himself and *Martha Eliza Macdaniell*, and there is nothing in his will to suggest any intention on his part to put an end to it, and we know in fact that it was not put an end to. [His Lordship then went through the various clauses of the will, and continued:—] Looking at the whole will, I think the testator treats the connection between himself and *Martha Eliza Macdaniell* as subsisting and to continue, and that his meaning and intention was to provide for her children then living and to be afterwards born; and the effect of the will will best be given if we interpolate in the will after the words "pregnant at my death" the words "all of whom I am willing to treat as my natural children." I come to the conclusion, as a matter of construction, that the word "children" is used by the testator as including illegitimate children.

Then comes the question, Is that a gift to which the law will give effect, or must it fail either on the ground of uncertainty or as being against public policy? On both these points it seems to me that the case of *Occleston* v. *Fullalove* (1) is a distinct authority, and it is not for me to question it. If the subject should ever come to be considered by the final Court of Appeal, the fact of Lord *Selborne's* dissent from the other Judges in that case will no doubt have great weight, but I am bound by the

(1) Law Rep. 9 Ch. 147.

decision of the majority. All I have to do is to find out what was decided, and to abide by it.

Lord Justice *James* is reported to have said (1): "Another result is, that when a man is speaking of illegitimate children as his, there can be no doubt as to what he means as to existing children; but there may be an insoluble question, an uncertainty not capable of being made certain as to future children. A man makes a gift 'to my future children by *A. B.*,' there is a condition annexed to the gift that they shall be really his children, but that is a condition the existence or non-existence of which it is impossible to ascertain. His access or non-access, the access or non-access of any other person or persons, the more or less profligacy or immorality of the female, the signs of race or caste or blood, might have all to be inquired into and brought into public discussion before it could be ascertained whether or not they were his children. The law forbids such inquiries." Therefore it is clear that the Lord Justice recognised it to be the law that if the illegitimate children are defined with reference to their paternity the gift will fail for uncertainty.

But then he goes on to say (2): "But with regard to the female there is no uncertainty. Whether a child is or is not born of her body is a fact perhaps of all others the most easily capable of conclusive proof, and, if there be an unqualified, unconditional gift by a testator 'to the illegitimate children born and to be born of the body of *A. B.* before my death,' there can be, at all events, no uncertainty in ascertaining at his death who are the persons answering the description."

That shews, therefore, that in the opinion of Lord Justice *James* such a gift as the present is not void for uncertainty. And Lord Justice *Mellish* says (3): "In my opinion a bequest to the illegitimate children of a particular woman, who shall be the reputed children of the testator, is not more uncertain than a bequest to the future illegitimate children of a woman simply." Therefore he was of the same opinion. Then as to the other question; is there anything in the policy of law opposed to such a gift? That also seems to me to be settled by *Occleston* v.

(1) Law Rep. 9 Ch. 163. (2) Law Rep. 9 Ch. 164.
(3) Law Rep. 9 Ch. 170.

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Fullalove (1). The distinction appears to be this. If the gift is by deed in favour of future illegitimate children, or by will in favour of illegitimate children to be begotten after the death of the testator, it is bad; but if it be by will to illegitimate children to come into existence between the date of the will and the death of the testator, it is not bad. In *Occleston* v. *Fullalove* the gift was to "all other children which he might have or be reputed to have by *M. L.*, then born or thereafter to be born." And it was held that a child born between the date of the will and the death of the testator could take. Lord Justice *James* said (2): "If there be an illicit condition precedent or subsequent to a gift, it either avoids the gift or becomes itself void. If the gift requires or implies the continuation of wrongdoing, that is in substance a condition of the gift, and falls within the rule as to conditions. But how can that apply to an instrument like a will, with reference to gifts taking effect at the death in favour of persons then in existence? The will takes effect because, whenever dated or executed, it is the expression of the testator's last will—of the intentions which he has at the last moment of his existence. His keeping and leaving it unrevoked is, in point of law, and generally in fact, a continued adhesion to it. And if a man could, by an attested signature, made the moment before his death, make validly such a disposition as that now in question before us (of which there can be no doubt), how does any question of public policy intervene to affect the disposition which he has made some days, or months, or years beforehand, to be produced and take effect as his last intention upon, and not until, the moment of his death." And further on (3) his Lordship says: "So I conceive that if a testator were to provide by will for the offspring of a really future *damnatus coitus* (future with respect to the will taking effect as a will), it would be void as a gift, by reason of the illegal condition precedent, and as being a direct inducement to the man and woman to continue in a life of lawless immorality. But that, as I have said, cannot be predicated of an instrument revocable and secret until the moment of the testator's death,

(1) Law Rep. 9 Ch. 147. (2) Law Rep. 9 Ch. 161.
(3) Law Rep. 9 Ch. 166.

and a gift thereby made absolutely and without any condition in favour of a person then in existence, however that existence had been caused." And Lord Justice *Mellish* says (1): "I have next to consider whether a bequest to the future illegitimate children of a woman, who shall be the reputed children of the testator, is void on the ground of public policy. I agree that the earlier authorities, and, in particular, *Blodwell* v. *Edwards* as reported (2), do go a long way to establish that a settlement of property by deed on future reputed children or bastards is void, as being contrary to public policy. *Fenner*, J., is there reported to have said 'that they had conferred with divers of the Justices in *Serjeants' Inn*, and that the greater opinion of them was that a remainder to his first reputed son or bastard is not good; because the law doth not favour such a generation, nor expect that such should be, nor will suffer such a limitation for the inconvenience which might arise thereupon.' I am not disposed to throw any doubt on the correctness of this opinion. If a man, at the commencement of an illicit intercourse with a particular woman, could make a valid settlement on his expected illegitimate children, this would, I think, manifestly encourage the immoral connection and discourage marriage, which the law favours. The present case, however, is the case of a will, and it is necessary to consider how far the same doctrine applies to wills. Now if a will was so worded as to give a bequest to illegitimate children to be begotten after the death of the testator, I think it would be subject to the same objection as a settlement by deed; and it may be observed that both in *Metham* v. *Duke of Devon* (3) and in *Hill* v. *Crook* (4) the will was the will of a third person, and not of either the father or the mother of the children; and if in those cases the word 'children' had been held to include future illegitimate children, it would have included children begotten after the death of the testator, when the will had come into operation. In the present case, the will being the will of the putative father himself, it is impossible that it can encourage an immoral intercourse after his death." The rule laid down therefore appears to be that a gift to illegitimate

(1) Law Rep. 9 Ch. 171.
(2) Cro. Eliz. 509.
(3) 1 P. Wms. 529.
(4) Law Rep. 6 H. L. 265.

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children begotten before the death of the testator is good. Here the children to take are children of *Eliza Macdaniell* born before or of which she may be pregnant at the time of the testator's death. The case seems to me, therefore, to fall within that rule.

I was referred to the case of *In re Bolton* (1), but that does not seem to touch the case. There the class of children to take were defined with reference to their paternity, and it was held that they could not take. But Lord Justice *Cotton*, as to the *ratio decidendi* of *Occleston* v. *Fullalove* (2) says (3): "It only decided that the child came within the description in the will of children whom he might be reputed to have by a particular woman, and that there was no rule of public policy which prevented the child from taking." It seems to me that the Lord Justice recognised what I consider to be the principle of *Occleston* v. *Fullalove;* therefore having come to the conclusion which I have stated upon the construction of the will, I am of opinion that the fund is divisible into sevenths.

Solicitors for Petitioner: *Soames, Edwards & Jones.*

Solicitors for other Parties: *Tatham, Son, & Lousada; G. F. Hudson, Matthews & Co.; Chinery, Aldridge & Co.; Hughes, Hooker, Buttanshaw, & Thunder; Weall & Barker.*

(1) 31 Ch. D. 542. (2) Law Rep. 9 Ch. 147.
(3) 31 Ch. D. 552.

W. W. K.

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ACTION—Personal action—Right of executors to sue—Infringement of trade-mark 700
See TRADE-MARK. 1.

ADMINISTRATION ACTION — *Creditors — Real Estate—Specific Devisee—Lis Pendens—Registration—Priority.*] Where debts are charged upon a testator's real estate by his will, or as judgment debts under the old law, an action by a creditor for the administration of the real and personal estate is a lis pendens which, when registered, gives the plaintiff priority over a purchaser or mortgagee from any defendant entitled to real estate under the will, except where the defendant is in such a position that the purchaser or mortgagee has a right to suppose he is selling or mortgaging for the purpose of paying the testator's debts.—A creditor's action for general administration may be a sufficient lis pendens, before final decree, so as to entitle the plaintiff to priority over a purchaser or mortgagee taking, subsequently to the registration of the lis, from a specific devisee who is a defendant, if the plaintiff, previously to the purchase or mortgage, has sufficiently indicated the real estate sought to be charged in the action; a mere general claim for administration of the real and personal estate not being of itself a sufficient indication of intention to make liable the specifically devised real estate.—*Drew* v. *Earl of Norbury* (3 J. & Lat. 267) and *Walker* v. *Flamstead* (2 Keny. part 2, p. 57) considered. PRICE *v.* PRICE 297

ADMITTANCE—Copyhold—Fine - - 642
See COPYHOLD.

AFTER-ACQUIRED PROPERTY—Mortgage contract - - - - - 109
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AGENT—Application to register trade-mark 162
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ANIMALS—Society for benefit of—Charitable gift - - - - - 472
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ANNULMENT OF BANKRUPTCY — Debt incurred by fraud - - - 266
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APPEAL—Security for costs - 7, 459
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—— Trade-mark—Refusal to register - 231
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APPOINTMENT—Power—Validity - 128
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ARRANGEMENT WITH CREDITORS—Debt incurred by fraud - - - 266
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ATTORNMENT CLAUSE—Mortgage—Distress for rent—Winding-up - - 656
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BANKRUPTCY — *Arrangement with Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 28—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 15—*Debt incurred by Fraud—Statute of Limitations.*] C., a broker, sold without authority bonds left with him by A., a customer, for safe custody, and misappropriated the proceeds. C. became bankrupt, and the sale being then discovered A. proved for the value. The creditors passed a resolution under the Bankruptcy Act, 1869, sect. 28, accepting a proposal that T., a friend of the bankrupt, should pay a composition of 6*d.* in the pound on all the debts in full discharge thereof, and that on such payment the bankruptcy should be annulled. A. received the composition, but did not otherwise assent to the arrangement. In August, 1880, the bankruptcy was annulled. In May, 1886, an order in the Chancery Division was made for administration of the estate of C., who had died in the interval:—*Held*, that the debt due from C. to A. was incurred by fraud within the meaning of

BANKRUPTCY—*continued.*

sect. 15 of the Debtors Act, 1869; that sect. 15 applied not only to compositions and arrangements under sects. 125 and 126 of the Bankruptcy Act, 1869, but to arrangements under sect. 28, and that the debt therefore was not discharged by the arrangement:—*Held*, also, that as the debt was incurred by fraud which was not discovered till after the adjudication, and an action could not be brought while the bankruptcy was in force, the Statute of Limitations did not begin to run till the bankruptcy was annulled, and as an order for administration was made within six years from that time, A. was entitled to prove in the administration for the unpaid part of his debt.—Decision of Bacon, V.C., affirmed. *In re* Crosley. Munns *v.* Burn - - **C. A. 266**

BENEFICE—*Ecclesiastical Benefice—Resignation—Validity—Acceptance—Condition—Pressure—Pecuniary Consideration—Revocation before Acceptance.*] It is not essential to the validity of a deed of resignation of an ecclesiastical benefice that it should be made by the clerk before a notary public; the Bishop can dispense with that formality and accept a resignation made by a deed duly executed, and sent to him by the clerk.—It is not necessary that the Bishop's acceptance of a resignation should be in writing, and no particular form is necessary; and if the resignation is sent in at the Bishop's request no further acceptance is required.—Though the resignation of a benefice must (except in the case of an exchange) be absolute, not conditional, it is perfectly legal for the Bishop to fix a future time at which the resignation, when accepted by him, shall come into actual operation by his declaring the benefice vacant.—The resignation of a benefice is not void because it is made at the request of the Bishop in order to avoid scandal and legal proceedings.—If the Bishop, in accepting the resignation of a benefice, agrees to postpone the declaration of the vacancy in order to enable the clerk to receive the next accruing payment of tithe rent-charge, this does not render the resignation invalid as having been made for a pecuniary consideration.—Per North, J.: A clerk who has tendered his resignation to the Bishop cannot withdraw it, even before acceptance, if, in consequence of the tender, the position of any party has been altered: e.g., if the Bishop has been thereby induced to abstain from commencings proceedings in the Ecclesiastical Court for the deprivation of the clerk. Reichel *v.* Bishop of Oxford - - **C. A. 48**

BILL OF COSTS—Taxation - - - **568**
See Solicitor. 1.

BILL OF SALE—*Invoice and Receipt—Documents not constituting an Assurance of Chattels—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Bills of Sale Act* (1878) *Amendment Act*, 1882 45 & 46 *Vict. c.* 43), *s.* 9.] In order that an inventory of goods with receipt attached, or a receipt for purchase-money of goods, may be a bill of sale within the meaning of sect. 4 of the Bills of Sale Act, 1878, it must amount to an assurance of the chattels at law or in equity.—*Woodgate* v. *Godfrey* (5 Ex. D. 24) and *Marsden* v. *Meadows* (7 Q. B. D. 80) approved.—*Cochrane* v. *Matthews* (10 Ch. D. 80, n.), *Ex parte Odell* (10 Ch. D. 76), and *Ex parte Cooper* (10 Ch. D. 313) distinguished.—The B. company, which was a colliery company, being in want of money, applied for assistance to the Plaintiffs, who were a wagon company. After some negotiations the Plaintiffs gave the B. company cheques for £1000, and the B. company sent the Plaintiffs an invoice for 100 wagons. At the same time an agreement was signed by the representatives of the two companies that the Plaintiffs should let the 100 wagons to the B. company for three years at a rent payable quarterly, the total rent for the three years amounting to £1000, with interest at 7 per cent. The agreement contained a clause empowering the Plaintiffs to seize the wagons and put an end to the agreement in case the rent should be in arrear for seven days; and an option for the B. company to purchase the wagons at a nominal price at the end of the term. The next day the B. company sent the Plaintiffs receipts for the £1000. The rent being in arrear, the Plaintiffs seized most of the wagons, but nine of them were detained by the Defendants, who were a railway company on whose line they were standing, on the ground that they had a lien on them for tolls.—An action having been brought by the Plaintiffs against the last-mentioned railway company for recovery of the nine wagons, the Defendants disputed the title of the Plaintiffs on the ground that the invoice and receipts constituted a bill of sale under the Bills of Sale Acts, which was void as a bill of sale, not being registered or in accordance with the scheduled form in the Act of 1882, sect. 9; and they also claimed a lien for tolls on the wagons:—*Held* (reversing the decision of Bacon, V.C.), that there was a complete contract between the Plaintiffs and the B. company for purchase and sale of the wagons, under which the Plaintiffs had a good title to the wagons, independently of the invoice and receipts: and therefore those documents did not constitute a bill of sale within the meaning of the Acts. North Central Wagon Company *v.* Manchester, Sheffield, and Lincolnshire Railway Company - - - **C. A. 191**

2. —— *Trust Property—Testator's Business—Sale by Trustee to co-Trustee—Unregistered Bill of Sale—Bankruptcy of Purchaser—Following Trust Assets—Bills of Sale Act*, 1878, *ss.* 4, 8.] A testator, who died in 1867, bequeathed all his property to his wife and two other persons upon certain trusts, and appointed them his executors, and empowered them to carry on his business of a wine merchant, with a direction that on his youngest son attaining twenty-one, his sons should successively have the option of purchasing the business upon certain terms. The widow alone proved the will, and carried on the business until 1873, when a suit was instituted to administer the estate, and the business was continued under the direction of the Court. In December, 1880, the widow died, having by her will appointed J. (a son of the testator) and one C. her executors, who were then made Defendants to the administration action.—In March, 1880, the youngest son attained twenty-one, and shortly afterwards J. (the other sons not desiring to purchase) offered to purchase the business as from the 30th of

BILL OF SALE—*continued.*
November, 1880, for £10,329 18*s*. The offer was accepted and sanctioned by the Court, and the arrangement was embodied in an agreement dated the 15th of September, 1882, which provided for the payment of the purchase-money with interest at a future time, and contained a declaration that J. and C., or other the trustees of the will of the testator, should have a lien or charge upon the business and effects agreed to be sold for the purchase-money and interest, and that if default should be made in payment of the purchase-money and interest at the time appointed, or if J. should become bankrupt, then the same might be recovered by the said trustees by action at law. From the date of this agreement J. carried on the business as his own until October, 1885, when he was adjudicated a bankrupt.—At this time the purchase-money was unpaid, and there still remained in specie certain wines and office furniture, which formed part of the testator's estate, and which were sold by arrangement with the trustee in bankruptcy for £632 18*s*. C. claimed this sum as representing trust chattels which he was entitled to follow:—*Held*, that under the agreement the property in the chattels passed to J.; that the clause in the agreement conferring a lien or charge for the purchase-money operated as a bill of sale within ss. 4, 8 of the Bills of Sale Act, 1878, and, not having been registered, was void as against J.'s trustee in bankruptcy; and therefore that C. was not entitled to the money. COBURN *v.* COLLINS - - - - 373

BISHOP—Acceptance of resignation of benefice
See BENEFICE. [48

BOARD OF TRADE—Trade-mark - - 231
See TRADE-MARK. 5.

CASES:—*Anglo-African Steamship Company, In re* (32 Ch. D. 348) distinguished - 1
See COMPANY. 8.

—— *Bain* v. *Fothergill* (Law Rep. 7 H. L. 158) followed - - - - 519
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—— —— v. —— (Law Rep. 7 H. L. 158) distinguished - - - 390
See VENDOR AND PURCHASER. 2.

—— *Belding* v. *Read* (3 H. & C. 955) distinguished - - - - 109
See MORTGAGE. 1.

—— *Britain* v. *Rossiter* (11 Q. B. D. 123) discussed - - - - 681
See SPECIFIC PERFORMANCE. 2.

—— *Burrell* v. *Egremont* (*Earl of*) (7 Beav. 205) followed and explained - - 607
See LIMITATIONS, STATUTE OF. 2.

—— *Cape Breton Company, In re* (29 Ch. D. 795) followed - - - - 400
See COMPANY. 4.

—— *Cochrane* v. *Matthews* (10 Ch. D. 80, n.) distinguished - - - 191
See BILL OF SALE. 1.

—— *Cooper, Ex parte* (10 Ch. D. 313) distinguished - - - - 191
See BILL OF SALE. 1.

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—— *Drew* v. *Norbury* (*Earl of*) (3 J. & Lat. 267) considered - - - - 297
See ADMINISTRATION ACTION.

—— *Elliott* v. *Elliott* (12 Sim. 276) followed 350
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—— *Exhall Coal Mining Company, In re* (4 D. J. & S. 377) disapproved but followed 656
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—— *Howe* v. *Smith* (27 Ch. D. 89) followed 384
See VENDOR AND PURCHASER. 1.

—— *Marsden* v. *Meadows* (7 Q. B. D. 80) approved - - - - 191
See BILL OF SALE. 1.

—— *Neal, In re* (31 Ch. D. 437), questioned 272
See PRACTICE. 9.

—— *Norton* v. *Turvill* (2 P. Wms. 144; 2 Eq. C. Ab. 152) explained - - 94
See LIMITATIONS, STATUTE OF. 1.

—— *Occleston* v. *Fullalove* (Law Rep. 9 Ch. 147) followed - - - - 728
See WILL. 2.

—— *Odell, Ex parte* (10 Ch. D. 76) distinguished
See BILL OF SALE. 1. [191

—— *Otto* v. *Steel* (31 Ch. D. 241) distinguished
See PATENT. 1. [416

—— *Phillips* v. *Sylvester* (Law Rep. 8 Ch. 173) followed and discussed - - 390
See VENDOR AND PURCHASER. 2.

—— *Pike* v. *FitzGibbon* (17 Ch. D. 454) distinguished - - - - 4
See HUSBAND AND WIFE. 2.

—— *Plimpton* v. *Spiller* (6 Ch. D. 412) distinguished - - - - 416
See PATENT. 1.

—— *Pooley's Trustee* v. *Whetham* (33 Ch. D. 76) distinguished - - - 7
See PRACTICE. 7.

—— *Radcliffe* v. *Buckley* (10 Ves. 195) distinguished - - - - 558
See WILL. 1.

—— *Sampson & Wall, In re* (25 Ch. D. 482) followed - - - - - 21
See INFANT.

—— *Tanqueray-Willaume and Landau, In re* (20 Ch. D. 465) explained - 561
See EXECUTOR.

—— *Voss, In re* (13 Ch. D. 504) observed upon
See HUSBAND AND WIFE. 1. [345

—— *Walker* v. *Flamstead* (2 Keny. part 2, p. 57) considered - - - - 297
See ADMINISTRATION ACTION.

—— *Want* v. *Stallibrass* (Law Rep. 8 Ex. 175) distinguished - - - 384
See VENDOR AND PURCHASER. 1.

—— *Wilson, In re* (31 Ch. D. 522) explained 457
See TRUSTEE ACTS.

—— *Woodgate* v. *Godfrey* (5 Ex. D. 24) approved
See BILL OF SALE. 1. [191

—— *Youngs, In re* (31 Ch. D. 239) questioned
See PRACTICE. 9. [272

CERTIORARI—Friendly society—Dispute between members - - - 332
See FRIENDLY SOCIETY.

CHARITY—*Charity Commissioners—Jurisdiction —"Charity Property"—Property held on trust "for the use and benefit of" a Parish—City of London Parochial Charities Act*, 1883 (46 & 47 *Vict. c.* 36), *ss.* 5, 10, 11.] Under the provisions of the Act 35 Geo. 3, c. 61, passed in 1795, a piece of land was vested in trustees for the purpose of building a workhouse for the poor of a parish in the city of London, and power was given to raise £10,000, to pay for the land and the building, by the grant of annuities for lives or years, which were to be charged on rates which the Act authorized to be levied on the parishioners. The Act provided that the land should be held "for the use and benefit of the parish." The workhouse was built, and was used for many years for the poor of the parish. In 1837 a poor law union was formed, and, the workhouse being no longer required, the income of the property was thenceforth applied in aid of the poor-rates of the parish:—*Held*, that the property was "charity property" within the meaning of the City of London Parochial Charities Act, 1883, and was subject to the jurisdiction of the Charity Commissioners under that Act. *In re* St. Botolph without Bishopsgate Parish Estates - - - - - 142

2. —— *Charity Commissioners—Jurisdiction —Charity Property—Trust for benefit of Parish—Charitable Trusts Act*, 1853, *s.* 66.] Freehold property held by the vicar and churchwardens of the parish of St. Bride, Fleet Street, in trust for the benefit of the parish held to be "charity property" under the control of the Charity Commissioners. *In re* St. Bride's, Fleet Street, Church or Parish Estate - - - 147, n.

3. —— *Mortmain—Cy-près—General Charitable Intention—Failure of particular Object— —Bequest to establish Soup Kitchen and Cottage Hospital.*] A testator directed his trustees to set apart a sum of money out of such part of his personal estate as might by law be applied for charitable purposes, and to apply it in the establishment of a soup kitchen and cottage hospital for the parish of S. in such a manner as not to violate the Mortmain Acts.—A suit having been instituted to administer the trusts of the will, the Chief Clerk reported that it was impossible to apply the fund in accordance with the directions in the will:—*Held*, that the will shewed a general charitable intention to benefit the poor of the parish of S., and that although the particular purpose of the bequest had failed, the Court would execute the trust cy-près; and a scheme was directed accordingly. Biscoe *v.* Jackson [C. A. 460

4. —— *Mortmain—Indefinite Gift—Inclusion of Objects which are not charitable—Society for the Benefit of Animals.*] A testatrix gave legacies to several charities and societies, amongst others to the Society for the Protection of Animals liable to Vivisection and the Home for Lost Dogs. And she directed her trustees to pay and distribute the residue of that portion of her personal estate which might by law be appropriated by will for such purpose among such charities, societies, and institutions (including or excluding those hereinbefore mentioned as might be preferred), and in such shares and proportions as Lord S. should by writing nominate.—Lord S. survived the testatrix

CHARITY—*continued.*

and divided the pure residuary personal estate among a number of charities, not including the two above-mentioned societies for the benefit of animals. The next of kin claimed the fund on the ground that the gift was void for uncertainty and for including objects which were not charitable:—*Held* (affirming the decision of Kay, J.), first, that the scope of the will shewed that the testatrix referred only to charitable societies and institutions.—Secondly, assuming that the two societies for the benefit of animals were not charities, the fact that Lord S. had power to include them in the distribution of the fund did not make the bequest void.—But *semble*, the Society for the Protection of Animals liable to Vivisection and the Home for Lost Dogs, were charities within the statute 43 Eliz. c. 4.—*Quære*, whether the Society for the Total Suppression of Vivisection is a charity within the same statute. *In re* Douglas. Obert *v.* Barrow - - C. A. 472

——Trust for supplying turf to cottages - 355
See Manor.

CHILD—Held to mean grandchild - - 558
See Will. 1.

—— Illegitimate - - - 551, 728
See Will. 2, 3.

CHURCH BUILDING ACTS—*Statute* (43 *Geo.* 3, *c.* 108) *for promoting the erection of Churches—Married Women, without their Husbands, excepted —Married Women's Property Act*, 1882, *s* 1, *sub-s.* 1—*Gift by a Married Woman, by Will, towards the erection of a Church, invalid.*] Under the statute 43 Geo. 3, c. 108, which contained a power to all persons having an interest in any lands or in any goods or chattels to give by deed enrolled, or will executed, three months before death, lands not exceeding five acres, or goods and chattels not exceeding in value £500, for or towards the erecting of any church, with a proviso that the Act should not extend to any persons being within age, nor women covert without their husbands to make any such gift:—*Held*, that the proviso was not affected by the Married Women's Property Act, 1882, which by sect. 1, sub-sect. 1, gave power to married women to dispose by will of any real or personal property as her separate property in the same manner as if she were a feme sole.—Consequently a gift by a married woman, by will executed three months before death, to the vicar and churchwardens of a church of a sum of £300 to be applied by them in the erection of a new church, and to be paid out of personal estate which was legally applicable for the purpose was held to be invalid. *In re* Smith's Estate. Clements *v.* Ward - - 589

CLERGYMAN—Resignation of benefice - 48
See Benefice.

COMMISSIONERS—Charity - 142, 147, n.
See Charity. 1, 2.

COMMITTEE OF LUNATIC—Mortgage—Power of sale - - - - 470
See Lunatic.

COMPANY—*Contract for Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Construction— "At or before."*] A contract for the issue of shares as fully paid up was given to the allottee

COMPANY—*continued.*

late in the day for the purpose of his getting it filed with the Registrar of Joint Stock Companies, together with a certificate of the shares. The contract was filed on the following morning:—*Held*, that the contract was filed "at the time of" the issue of the shares, and they were to be deemed fully paid up. *In re* Tunnel Mining Company. Pool's Case - - - 579

2. —— *Directors—Misfeasance—Rate of Interest charged—Payment of Dividends out of Capital—"Realized Profits"—Directors' Remuneration.*] The articles of association of a limited company provided that no dividends should be payable except out of "realized profits," and that no remuneration should be paid to the directors until a dividend of 7 per cent. had been paid to the shareholders. The business of the company consisted chiefly in lending money to builders on mortgages payable by instalments, and the directors treated, as part of the profits available for dividends, the value for the time being (upon an estimate made by their surveyor who was also their secretary) of the instalments of principal and interest remaining unpaid by each mortgagor. Upon this footing the directors paid for several years, out of the floating capital from time to time in their hands, (1) dividends of 7½ per cent. and upwards; (2) remuneration to themselves. Upon a summons taken out in the winding-up of the company by a creditor:—*Held*, that "realized profits" must be taken in its ordinary commercial sense as meaning at least "profits tangible for the purpose of division," and that the directors having treated estimated profits as realized profits, and having in fact paid dividends out of capital, on the chance that sufficient profits might be made, were jointly and severally liable, as upon a breach of trust, to repay, and must repay, the sums improperly paid as dividends, and also the remuneration they had respectively received, with interest in each case at 4 per cent.—The directors also, without the knowledge of the shareholders, voted and paid themselves out of the funds of the company a commission on certain purchases and sales, and entered such payment in the books of the company, but made no mention of it in their reports or balance-sheets:—*Held*, that they were jointly and severally liable to repay, and must repay, this amount with interest at 5 per cent. *In re* Oxford Benefit Building and Investment Society - - - - - 502

3. —— *Management—Subscribing Company's Funds to Public Objects—Ultra vires.*] At a meeting of the stockholders or proprietors of a railway company a resolution was passed authorizing the directors to subscribe a sum out of the company's funds towards the erection of the Imperial Institute:—*Held*, that the proposed subscription was not prevented from being ultrà vires by the fact that the establishment of the Institute might benefit the company by causing an increase of passenger traffic over their line. Tomkinson *v.* South-Eastern Railway Company - 675

4. —— *Promoters—Purchase of Mine by Syndicate—Resale to Company—Rescission impossible—Fiduciary Relation—Principal and Agent—Sale of Agent's own Property to Principal.*] On the 1st of February, 1873, five persons (one of whom was a solicitor and conducted the negotiations) purchased a leasehold mine for £5000 with the view of reselling it to a company to be formed: but they had at that time taken no steps to form any company. They completed their purchase on the 17th of March, 1873, the purchase-money being paid out of their own moneys, and on the 4th of April they entered into a provisional contract with a trustee for an intended company for the sale of the mine to the company for £18,000. On the 8th of April the company was registered under the Companies Acts, its principal object being, as stated in the memorandum of association, the purchase of the mine, and in its articles the contract of the 4th of April, 1873, was adopted and confirmed, and four of the vendors were named as directors; but the contract of the 1st of February, 1873, was not disclosed to the company. The whole of the shares were placed by the vendors, and the share capital (£30,000) paid by them. At the same time they received £18,000 from the company as the purchase-money for the mine. In 1882 the company was wound up voluntarily, and in the course of the winding-up the facts relating to the purchase of the mine by the vendors became known to the company. In 1883 the company allowed judgment by default to go against them in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions against the executors of three deceased vendors and the two surviving vendors to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary position to the company:—*Held* (affirming the decision of Stirling, J.), first, that the evidence did not prove that the vendors when they purchased the mine were promoters of, or in a fiduciary position towards, the company which was ultimately formed; secondly, that assuming that the vendors committed a breach of duty in not informing the company after it was formed that the mine was their own property, and consequently that the company might have rescinded the contract, yet as rescission was now impossible the company could not recover from them the profit which they had made. The actions were accordingly dismissed.—*In re Cape Breton Company* (29 Ch. D. 795) followed. Ladywell Mining Company *v.* Brookes. Ladywell Mining Company *v.* Huggons - - - - - C. A. 400

5. —— *Stock of Railway Company—Transfer by Trustees to Beneficial Owner—Companies Clauses Consolidation Act*, 1845, *incorporation of, with Private Act—Regulations required by the Act for legally vesting Stock, not complied with.*] Stock of a railway company with whose Act the Companies Clauses Consolidation Act, 1845, was incorporated, stood registered in the names of two trustees who held in trust for A. In 1869, A. by a voluntary deed purported to assign the stock upon certain trusts; and this deed had been held to be operative on such of the property comprised in it as was at its date vested in A. in equity only, but not on any property then legally vested in him. It appeared that prior to the deed of 1869, the trustees of the stock had executed and sent to the secretary of the company a transfer to A.,

COMPANY—*continued.*
defective in various particulars, including the stamp. The secretary returned it, and the defects were not made good till after the execution of the voluntary deed:—*Held*, that at the date of the voluntary deed there had been no such delivery to the secretary of the transfer as required by sect. 15 of the Companies Clauses Consolidation Act, and that the legal title to the stock had not then passed to A. NANNEY *v.* MORGAN - 598

6. —— *Winding-up — Distress for Rent accrued after Winding-up Order — Mortgage with Attornment Clause — Companies Act*, 1862, *ss.* 87, 163.] A limited company mortgaged certain cotton mills, machinery, and fixtures for £22,000. The mortgage deed contained a clause by which the company attorned tenants to the mortgagees at an annual rent of £1595.—The company was ordered to be wound up, and the official liquidator remained in possession of the mills for more than a year in order that he might, if possible, sell them as a going concern. He paid the expenses of keeping the premises and the machinery in repair, but did not actually work the mills. The mortgagees acquiesced in this arrangement, believing it to be the best for all parties. The mortgagees then applied for leave to distrain for a year's rent accrued since the winding-up order:—*Held* (affirming the decision of North, J.), that as it appeared from the evidence that the occupation of the liquidator was for the benefit of the mortgagees as well as of the company, the mortgagees ought not to be allowed to distrain.—*In re Exhall Coal Mining Company* (4 D. J. & S. 377) disapproved but followed.—When a landlord applies to the Court for leave to distrain for rent upon the goods of a company which is being wound up, he must shew either that there are special circumstances rendering it inequitable for the 163rd section to be enforced against him; or that the rent has accrued under such circumstances that it ought to be paid as part of the costs of the winding-up.—*Semble*, a mortgagee with an attornment clause who asks for leave to distrain for his interest after a winding-up order, is in a more unfavourable position than a landlord who asks for leave to distrain for rent. *In re* LANCASHIRE COTTON SPINNING COMPANY. *Ex parte* CARNELLEY - - - C. A. 656

7. —— *Winding-up Petition — Withdrawal by Petitioner — Costs.*] As a general rule a Petitioner who withdraws his petition for the winding-up of a company will be ordered to pay the costs of the parties appearing. But the rule is not an inflexible one, and the Court will have regard to the circumstances of each case. *In re* DISTRICT BANK OF LONDON - - - - 576

8. —— *Winding-up—Practice—Service out of the Jurisdiction—Service of Notice to settle List of Contributories—General Orders and Rules of Nov.* 11, 1862, *r.* 30.] A notice under the General Order of Nov. 11, 1862, r. 30, of an appointment to settle the list of contributories of a company may be served out of the jurisdiction in manner provided by rule 60.—*In re Anglo-African Steamship Company* (32 Ch. D. 348) distinguished. *In re* NATHAN NEWMAN & Co. C. A. 1

COMPENSATION—Sale of house—Loss of tenant
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CONDITION—Resignation of benefice - 48
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CONTRACT—For shares—Registration - 579
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CONTRIBUTORIES — Service of notice out of jurisdiction - - - - 1
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CONVEYANCING ACT, 1881—Sale by equitable mortgagee - - - - 668
See MORTGAGE. 3.

COPYHOLD — *Several Fines — Surrender — Appointment — Tenant — New Title — Second Admittance.*] The lord of the manor is entitled to a fine in respect only of a transmission of the legal estate in copyholds, and cannot claim a fine in respect of any devolution of the equitable title where the legal estate remains in the person who has been already admitted tenant on the roll.—E., as customary heir of M., was in 1848 admitted as tenant on the rolls of a manor, in respect of copyholds which by M.'s will the trustees thereof were directed to sell. The trustees contracted to sell the copyholds to A., but before completion A. was married to X. Subsequently, in December, 1849, the copyholds were conveyed to the trustees of A.'s marriage settlement. E. joined in the conveyance and thereby covenanted to surrender to the uses of such settlement, and in pursuance of his covenant surrendered in May, 1850, to the use of such persons as the trustees of A.'s settlement should appoint. Upon the death of X., A. became absolutely entitled to the copyholds, and by deed of 1853, which recited incorrectly that no surrender had been made by E., the trustees of the settlement granted, bargained, and sold the copyholds to A., and E. joined in this deed and covenanted to surrender to the use of A. The surrender was not acted upon, and by a settlement of 1854 on the second marriage of A. with Y., she purported to assign her equitable interest in the copyholds to E., F., and G. on trust for sale. A. died in 1856, leaving E., who had remained tenant on the rolls, her customary heir. E. survived F. and G., leaving executors on whom, under the Conveyancing Act, 1881, s. 30, his estate in the copyholds devolved; and they had been admitted.—Three fines were claimed by the lord: 1. In respect of the quasi admittance of A. as appointed under the deed of 1853; 2. In respect of the quasi admittance upon A.'s death of E., as her customary heir; 3. In respect of the legal estate which devolved upon E.'s executors:—*Held*, that the deed of 1853 was a mere assignment of the equitable interest in the copyholds to A., and could not be construed as operating by appointment to transfer the legal estate from E. to A.; and accordingly that as the legal estate of E., the tenant on the roll, remained unaffected by the equitable devolutions of title, the only fine pay-

COPYHOLD—*continued.*
able was in respect of the admittance of the statutory heirs of E.:—*Held*, also, that a covenant for value to surrender, though binding as between surrenderor and surrenderee, cannot be enforced by the lord, so as to entitle him to compel a new admittance and a fine in respect thereof. HALL *v.* BROMLEY - - - - C. A. 642

COSTS—Mortgagee's suit - - - 544
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—— Non-payment of contempt — Staying proceedings - - - - 272
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—— Security for - - - 7 459
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—— To surrender—Fine - - - 642
See COPYHOLD.

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DEBTS—Presumption of payment 561
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DEFAULT—Judgment by—Foreclosure - 160
See PRACTICE. 5.

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See SPECIFIC PERFORMANCE. 1.

DEFENDANT—Third parties - - 287
See PRACTICE. 10.

DELAY—Action to recover deposit - - 384
See VENDOR AND PURCHASER. 1.

—— Security for costs—Appeal - - 459
See PRACTICE. 8.

DELEGATION—Power of appointment - 128
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DEPOSIT—Forfeiture of - - - 384
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—— Specific performance of agreement - 681
See SPECIFIC PERFORMANCE. 2.

ECCLESIASTICAL DILAPIDATIONS (34 & 35 *Vict. c.* 43), *ss.* 34, 36—*Claim by succeeding, against Estate of deceased, Incumbent—Payment pari passu with Debts of other Creditors.*] Where the Bishop has, under sect. 34 of the Ecclesiastical Dilapidations Act, 1871, made an order stating the cost of the repairs for which the executors of a late incumbent are liable, the sum so stated is under sect. 36 a debt payable to the new incumbent out of the assets of the late incumbent pari passu with the debts of his other creditors. *In re* MONK. WAYMAN *v.* MONK - - - 583

EXECUTION—Share of partner—Dissolution 436
See PARTNERSHIP.

EXECUTIVE JUDGMENT—Spanish law - 704
See JUDGMENT.

EXECUTOR—*Vendor and Purchaser—Title—Sale by, many Years after Death of Testator.*] The rule intimated in *In re Tanqueray-Willaume and Landau* (20 Ch. D. 465), that where an executor is selling real estate, after twenty years have elapsed from the testator's decease, a presumption arises that the debts have been paid, and the purchaser is therefore put upon inquiry, does not in general apply to the case of an executor selling leaseholds of his testator.—A testator bequeathed leaseholds to his executrix upon trust to pay an annuity, and bequeathed his residuary estate to the executrix. Shortly before twenty years had elapsed from the testator's decease the executrix contracted to sell the leaseholds at a price to be ascertained by a named person. Shortly after the twenty years had elapsed the price was ascertained. It was not shewn that there were debts of the testator remaining unsatisfied, nor did it appear that the executrix had been in possession of the leaseholds as legatee:—*Held*, that the purchaser was not entitled to require the concurrence of the annuitant in the assignment of the leaseholds. *In re* WHISTLER - - - 561

FANCY WORD—Trade-mark - - 248
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FRAUD—Debt—Bankruptcy—Statute of Limitations - - - - - 266
See BANKRUPTCY.

FRIENDLY SOCIETY—*Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60)—*Disputes—Certiorari—Jurisdiction.*] The provisions in the Friendly Societies Act, 1875, ss. 22 (*d*) and 30, sub-s. 10, for the reference of all disputes between the society and its members to the County Court, are

FRIENDLY SOCIETY—*continued.*
permissive only, and not peremptory; and therefore there is, in a proper case, jurisdiction to remove to the High Court by certiorari proceedings in an action commenced against a friendly society by one of its members. *In re* Royal Liver Friendly Society - - - - - 332

GENERAL ORDERS AND RULES OF NOVEMBER 11, 1862, r. 30 - - 1
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GENERAL ORDERS UNDER SOLICITORS' REMUNERATION ACT, 1881, Sched. I., Part I. - - - - 568
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HUSBAND AND WIFE—*Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 8—*Real Estate descended on Married Woman as Co-heiress—Extent of Separate Use created by sect.* 8.] The 8th section of the Married Women's Property Act, 1870, does not enable a woman married after the passing of the Act to pass by an unacknowledged deed the fee simple of real estate, descended upon her.—Observations upon a dictum of Jessel, M.R., in *In re Voss* (13 Ch. D. 504, 505). Johnson *v.* Johnson - - - 345

2. —— *Separate Estate—Restraint on Anticipation — Payment to Married Woman under Order reversed on Appeal — Lien on Separate Estate—Liability of Married Woman not arising from Contract.*] A female infant entitled under a will to a share of residuary personalty contingently on her attaining twenty-one, married before—but came of age after—the commencement of the Married Women's Property Act, 1882. On her marriage a settlement of her property, not sanctioned under the Infants' Settlement Act, was made, under which she took the first life estate with a restraint on anticipation. On her coming of age the fund was paid to her under an order of the Court. The Court of Appeal reversed this order and declared her liable to refund, on the ground that the fund was subject to the settlement. She refunded part, but was unable to refund the remainder, which she had spent. After this the executors of the will paid to the trustees of the settlement an arrear of income which they had in hand:—*Held*, that so much of this income as accrued between the married women's attaining twenty-one and the order declaring her liability to refund must be retained in part satisfaction of her liability to refund.—*Pike* v. *Fitzgibbon* (17 Ch. D. 454) distinguished. *In re* Dixon. Dixon *v.* Smith - - - - C. A. 4

—— Infant—Post-nuptial settlement - 21
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—— Separate estate—Statute of Limitations 94
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IMPROVEMENTS—Settled Land Act 41, 307
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INCUMBENT OF PARISH—Dilapidations 583
See Ecclesiastical Dilapidations.

INFANT — *Married Woman—Ward of Court—Post-nuptial Settlement—Reversionary Interest in Personal Estate—Jurisdiction of Court—Infants' Settlement Act*, 1855 (18 & 19 *Vict. c.* 43).] The Court of Chancery never had, nor has the High Court now, jurisdiction to compel a ward of Court to make a settlement of his or her property.—The Infants' Settlement Act, 1855 (18 & 19 Vict. c. 43), has removed the disability of infancy only, leaving unaffected other disabilities, e.g., coverture and lunacy—and, under the Act, having regard to the decision of *In re Sampson & Wall* (25 Ch. D. 482), an infant married woman may do all that an adult married woman could do, but not more. Consequently in a case not falling within Malins' Act (20 & 21 Vict. c. 57), or the Married Women's Property Act, a post-nuptial settlement by a female infant ward of Court of her reversionary interest in personal estate will not bind that property or deprive her of her right to it by survivorship if the interest does not fall into possession during the coverture.—A settlement of such interest (notwithstanding its approval by the Judge) is void and incapable of confirmation, and can be validated only by something which amounts to a new disposition by her while sui juris.—Decision of Bacon, V.C., reversed. Buckmaster *v.* Buckmaster C. A. 21

—— Tenant for life—Settled Land Act - 338
See Settled Land Act. 1.

INFRINGEMENT—Trade-mark - - 700
See Trade-mark. 1.

INTEREST—Mortgage—Statute of Limitations
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—— Mortgage—Sale under power—Surplus 544
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INTERROGATORIES — Third parties—Opposite parties - - - - 287
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INVOICE—Bills of Sale Act - - 191
See Bill of Sale. 1.

JUDGMENT—*Foreign Judgment.*] Besides "plenary" proceedings in which all rights can be contested between the parties, summary proceedings called "executive," can be taken in the Spanish Courts in respect of certain matters. In such proceedings certain defences only can be raised. Notwithstanding a judgment in executive proceedings, "plenary" proceedings can be taken by either party in respect of the same matter, which may supersede such judgment; but the judgment can in the meantime be executed:—*Held*, that a judgment in "executive" proceedings is a final judgment and can be sued upon in this country. *In re* Henderson. Nouvion *v.* Freeman - - - - - 704

JURISDICTION—Friendly society—Certiorari
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LANDLORD AND TENANT—*Lease—Power of Leasing — Covenant for Renewal — Sanction of Court — "Best Rent" — Specific Performance—Damages*—12 & 13 *Vict. c.* 26—13 & 14 *Vict. c.* 17.] A covenant for renewal in a lease executed by a lessor under a power of granting leases in possession at the best rent is good, and may be enforced against the lessor, provided that, at the time for its performance, the new lease reserves the best rent that can then be obtained, and contains only stipulations then authorized by the power.—But if at the time when performance of the covenant is claimed, the stipulated rent is not the best rent, the lessee is not entitled either to specific performance or damages, even though the original lease had been sanctioned by the Court in the presence of all the beneficiaries.—A private Act of 1828 relating to a testator's real estate empowered his trustees to grant building leases in possession not exceeding seventy-five years at "the best yearly rent." In 1860, under an order in certain suits relating to the estate, the surviving trustee, in pursuance of the power and with the approval of the Judge (some of the cestuis que trust being also before the Court and others being represented by trustees) demised certain copyhold land to a gas company (then in occupation under an agreement for the lease, which agreement had also been sanctioned by the Court) for thirty years at the yearly rent of £30, the lessor covenanting to renew at the end of the term for a similar term at the like rent, if the lessees previously signified their desire for renewal by notice in writing delivered to the lessor "his heirs or assigns, or left at his or their usual place or places of abode." The lessor had obtained from the lord of the manor of which the copyhold land was held a license to grant leases covering fifty-one years from the date of the lease.—Under the agreement for the lease and before the lease was executed, the company spent a considerable sum in erecting a large purifying-house on the land.—Before the expiration of the lease the solicitors to a new gas company, the successors to the original lessees, gave notice in writing to the solicitors to the then trustees, the original lessor having died, of the lessees' desire for renewal, but the lessors declined to renew on the grounds (amongst others) that, as the fact was, the value of the property had very largely increased, that the original rent was therefore not now "the best yearly rent," and that the covenant for renewal was not authorized by the power.—In an action by the company against the present trustees and their cestuis que trust claiming specific performance of the covenant or damages:—*Held*, (1) that the covenant was not ultrà vires: but (2) that specific performance of it could not be enforced, as the original rent was not now the best rent; (3) that the Act 12 & 13 Vict. c. 26, enabling the Court to remedy defects in leases in certain cases, did not apply to the present case, there having been no "mistake or inadvertence" on the part of the lessor, nor "ignorance of title on the part of the lessees;" and (4) that on the doctrine of *Bain* v. *Fothergill* (Law Rep. 7 H. L. 158) the lessees could not recover damages for a breach of covenant arising from infirmity of title. — *Quære*, whether giving notice for renewal to the lessors' solicitors was a proper compliance with the terms of the lease as to notice. GAS LIGHT AND COKE COMPANY *v.* TOWSE - - - - 519

LANDS CLAUSES ACT — Purchase-money for commonable lands - - - 355
See MANOR.

LEASE—Power of leasing—Covenant to renew
See LANDLORD AND TENANT. [519

LEGAL ESTATE—Sale by equitable mortgagee
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LIBEL ON BUSINESS—Circulars to customers
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LIEN—Separate estate of wife - - 4
See HUSBAND AND WIFE. 2.

—— Solicitor - - - - - 489
See SOLICITOR. 2.

—— Tolls—Railway company - - 191
See RAILWAY COMPANY. 2.

LIGHT— *Easement—Implied Grant—Vendor—Equitable Owner—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6, *sub-ss.* 2, 4.] The owner (subject to a mortgage in fee) of a house and a plot of land adjoining first leased the house, then contracted to sell the land to the Defendant, and afterwards contracted to sell the house subject to the lease to a person under whom the Plaintiff claimed. The next step was a conveyance of the house by the owner and his mortgagee to the Plaintiff subject to the lease, which was followed by a conveyance (also by the owner and his mortgagee) of the land to the Defendant. The Plaintiff subsequently recovered possession of the house from the lessee for breach of condition:—*Held*, that no grant of light to the house could be implied over land which the owner had contracted to sell before the sale or conveyance of the house, and that sect. 6, subsect. 2 of the Conveyancing Act, 1881, did not apply. BEDDINGTON *v.* ATLEE - - 317

—— Specific performance of agreement - 681
See SPECIFIC PERFORMANCE. 2.

LIMITATIONS, STATUTE OF—*Married Woman—Separate Estate—Simple Contract Debt—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 3.] In 1875 a married woman borrowed money from her husband upon a parol agreement to repay him the amount with interest out of her separate estate. She died in 1884, without having paid anything in respect either of interest or principal, and without having given any acknowledgment in writing of her liability to repay the debt. After her death her husband claimed repayment:—*Held* (affirming the decision of Kay, J.), that the debt was barred by analogy to the Statute of Limitations.—*Norton* v. *Turvill* (2 P. Wms. 144; 2 Eq. C. Ab. 152) explained. *In re* LADY HASTINGS. HALLETT *v.* HASTINGS - C. A. 94

2. —— *Mortgagor and Mortgagee the same—Statute of Limitations—Payment—Trustees.*] S. was, under a will, entitled for her life to the interest on a sum of money which had been invested by the trustees of the will on mortgage of land. The mortgagor had afterwards conveyed the land (subject to the mortgage) to trustees on trust for S. for her life. During her life she received and retained the rents for more

LIMITATIONS, STATUTE OF—*continued.*
than twenty years:—*Held*, that though no interest had been actually paid, yet as the person who was entitled to the rents was also entitled to the interest, the rights of the trustee of the mortgage were not barred by 3 & 4 Will. 4, c. 27, s. 40, and that the fact of the rents being payable to one set of trustees and the interest being payable to another set of trustees did not alter the case where the cestuis que trust was in each case the same.—*Burrell* v. *Earl of Egremont* (7 Beav. 205) followed and explained. Topham *v.* Booth 607

—— Debt incurred by fraud - - 266
See Bankruptcy.

LIS PENDENS—Administration action - 297
See Administration Action.

LUNATIC—*Mortgagee—Power of Sale—Lunacy Regulation Act*, 1853, *ss.* 116, 136 — *Vesting Order.*] The Master in Lunacy having reported that it was desirable that property of which the lunatic was mortgagee should be sold under a power of sale in the mortgage, the Court declined to make an order authorizing the committee to sell and convey the estate to the purchaser, but only directed him to sell, leaving the transfer of the legal estate to be dealt with on a subsequent application under the Trustee Act, 1850. *In re* Harwood - - C. A. 470

MANOR—*Charity—Commonable Lands purchased by a Railway Company—Rights of Turbary—Rights of Lord of Manor in the Freehold—Allotment of Lands under an Act of Parliament in Trust for supplying Turves to Occupiers of Cottages—Rights of Lord of Manor and Occupiers of Cottages to Fund in Court—Costs.*] Prior to 1802 rights of turbary were claimed by the occupiers of certain cottages over large tracts of commonable and waste lands of a manor. In that year an Inclosure Act was passed by which Commissioners were empowered to allot lands in severalty to the lord and other persons interested, and to allot to the lord in trust for the occupiers of the cottages portions of the waste for a turf common to be managed as the lord and the churchwardens and overseers should order and not to be depastured. The Commissioners by their award, made in 1806, allotted unto the lord of the manor, in trust for the occupiers for the time being of the cottages, over 400 acres of waste for supplying turves for fuel for the use of such cottages. The Commissioners also allotted plots to the lord in lieu of his rights and interest in the soil, and they allotted parts of the waste grounds in severalty unto the owners and other persons interested in compensation for their rights.—A railway company took for the purposes of their undertaking part of the land allotted as turf common, and the purchase-moneys were paid into Court.—On a petition by the freeholder of the cottages for the distribution of the fund:—*Held*, that the freeholder had no claim against the fund, having only the indirect interest arising from enhancement of rent by reason of the privilege given to the occupiers; that the persons interested were the lord of the manor, the persons claiming under him, and the occupiers of the cottages; and that the rights of the occupiers were in the nature of a perpetuity

MANOR—*continued.*
specially created by the Legislature and were not charitable.—Inquiries directed accordingly. *In re* Christchurch Inclosure Act. - - 355

MARRIED WOMAN — Will — Gift — Building church - - - - 589
See Church Building Acts.

MARRIED WOMEN'S PROPERTY ACT - 345
See Husband and Wife. 1.

MAXIM—Actio personalis moritur cum personâ.
See Trade-mark. 1. [700

MIDDLESEX REGISTRY - - - 123
See Registry Acts.

MORTGAGE—*After-acquired Property—Uncertainty—Contract—Equitable Assignment.*] An assignment in 1876 by way of mortgage of all the mortgagor's household goods and farming stock, and "also all moneys of or to which he then was, or might during that security become, entitled under any settlement, will or other document, either in his own right, or as the devisee, legatee, or next of kin of any person," and also all real and personal property "of, in, or to which the mortgagor was, or during that security should become, beneficially seised, possessed, entitled or interested for any vested, contingent or possible estate or interest":—*Held*, to include a share of a testator's residuary estate to which the mortgagor became entitled subsequently to the date of the mortgage. —*Belding* v. *Read* (3 H. & C. 955) distinguished. *In re* Clarke. Coombe *v.* Carter - 109

2. —— *Mortgagor in Possession—Receiver—Mortgagor and Mortgagee—Occupation Rent.*] In a foreclosure action against mortgagor in possession, an order having been made for the appointment of a receiver and for the tenants to attorn and pay their rents in arrear and growing rents to such receiver:—*Held*, that the possession of the mortgagor being rightful, he was liable to pay an occupation rent from the date of demand by the receiver only, and not from the date of the order appointing the receiver. Yorkshire Banking Company *v.* Mullan - - - 125

3. —— *Power of Sale—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19, 21 —*Equitable Mortgage—Power to convey—Legal Estate.*] An equitable mortgagee by deed who sells in exercise of the power of sale conferred by the Conveyancing Act, 1881, cannot convey the legal estate vested in the mortgagor.—Decision of North, J., affirmed. *In re* Hodson and Howes' Contract - - - - C. A. 668

4. ——*Power of Sale—Surplus Proceeds—Interest on—Amount understated by Mortgagee—Costs.*] Where a mortgagee sells under his power of sale and, after he has paid himself his debts and costs out of the purchase-money, a surplus remains in his hands, it is his duty, if he cannot ascertain who are the persons entitled to the surplus, to set it apart so as to be fruitful for their benefit, and if he fails to do so he will be charged with interest at 4 per cent. from the time of the completion of the sale.—A mortgagee in possession sold under his power of sale and retained surplus proceeds of sale. In an action against him for accounts he admitted that a sum was due from him, and paid such sum into Court. On the

MORTGAGE—*continued.*
taking of the accounts it appeared that a considerably larger sum was due:—*Held*, that he ought not to be allowed his costs of taking the accounts. CHARLES *v.* JONES - - 544

—— Attornment clause — Distress for rent — Winding-up - - - 656
See COMPANY. 6.

—— Foreclosure—Practice - - - 160
See PRACTICE. 5.

—— Foreclosure—Registration - - 123
See REGISTRY ACTS.

—— Power of sale—Lunatic - - 470
See LUNATIC.

—— Priority—Lis pendens - - 297
See ADMINISTRATION ACTION.

—— Statute of Limitations - - - 607
See LIMITATIONS, STATUTE OF. 2.

MORTGAGOR IN POSSESSION - - 125
See MORTGAGE. 2.

MORTMAIN - - - - 460, 472
See CHARITY. 3, 4.

—— Church Building Acts - - - 589
See CHURCH BUILDING ACTS.

NEPHEW - - - - - 551
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NOVELTY—Patent - - - - 416
See PATENT. 1.

PARTICULARS OF OBJECTION—Patent - 283
See PATENT. 2.

PART PERFORMANCE - - - 681
See SPECIFIC PERFORMANCE. 2.

PARTNERSHIP—"*Chattel interest*" *of one Partner—Execution by Sheriff—Dissolution—Purchase by another Partner—Undervalue—Setting aside Sale—Insanity of Partner.*] During the temporary unsoundness of mind of the Plaintiff, who was a partner with the Defendant, the sheriff levied execution against his "chattel interest" in the partnership upon three judgments which had been obtained against him. At a sale by auction by the sheriff, the Defendant himself bought the interest for a sum very much below its actual value, and an assignment of the interest was executed by the sheriff to the Defendant. The purchase-money was paid to the sheriff by a cheque drawn by the Defendant on the partnership banking account, and the amount was debited to the Plaintiff in the partnership books.—The Plaintiff on recovering his health brought an action to set aside the sale on the ground of undervalue and undue advantage, for a declaration that the partnership was still subsisting, for a dissolution, and for the usual accounts:—*Held*, that the purchase was void and must be set aside.—*Held*, also, that under the circumstances of the present case there was no dissolution of the partnership by the seizure and sale.—Whether a sale by the sheriff of a partner's interest to his co-partner causes a dissolution, if the co-partner purchases with his own money, *quære*.—A sheriff cannot sell a partner's interest in the goodwill or book debts, or anything else which he cannot seize. HELMORE *v.* SMITH (1) - - C. A. 436

PATENT—*Novelty—Prior Publication—Foreign Specification in Patent Office Library.*] In December, 1878, and February, 1880, the specifications, in the German language, with drawings, of two patents taken out in Germany, were deposited in the free public library of the Patent Office; and the journal published periodically by the Patent Commissioners, amongst the list of patents granted in Germany, contained entries of the particular patents, with a note in each case that the specifications as well as the list of applications might be consulted in the free public library of the office.—In April, 1880, a patent was obtained in this country for an invention similar to those for which the German patents had been granted:—*Held* (affirming the judgment of Chitty, J.), that the fair and legitimate inference from the above facts was, that the public availed themselves of the facilities afforded to them for obtaining information as to the inventions, and accordingly that there was sufficient evidence of publication of the German specifications in this country prior to the date of the English patent of 1880 to avoid such patent.—*Held*, also, that this inference was not affected by the fact that the prior specifications were in the German language.—Per Cotton and Lindley, L.JJ.: Primâ facie a patentee is not the first inventor if before the date of his patent an intelligible description of his invention, either in English or in any other language commonly known in this country, was known to exist in this country either in the Patent Office or in any other public library to which persons in search of information on the subject would naturally go for information. But if it be proved that the foreign publication, although in a public library, was not in fact known to be there, the existence of the publication in this country is not fatal to the patent.—Per Lopes, L.J.: The existence of the German specifications in the library of the Patent Office, where they were unreservedly accessible to every one, was in itself conclusive evidence of a prior publication.—*Plimpton* v. *Spiller* (6 Ch. D. 412) and *Otto* v. *Steel* (31 Ch. D. 241) distinguished. HARRIS *v.* ROTHWELL - - - C. A. 416

2. —— *Practice—Particulars of Objection to Patent—Patents, Designs and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 29.] The Defendant in an action for the infringement of a patent denied the validity of the patent, and stated the objection that the specification did not sufficiently describe the nature of the invention and how it was to be performed. In compliance with an order for further particulars he repeated the above objection, with the addition that the specification did not contain a sufficient direction to enable skilled workmen to make a machine having the advantages alleged by the inventor. Kay, J., ordered further particulars, and the Defendant appealed.—*Held*, by Cotton and Lindley, L.JJ., that this order ought to be affirmed, for that, if the Defendant knew of a particular defect in the specification, he ought to point it out, that the Plaintiff might not be taken by surprise. CROMPTON *v.* ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION - - - C. A. 283

PAYMENT INTO COURT—Before trial - 180
See PRACTICE. 1.

PETITION—Winding-up—Withdrawal - 576
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PLEADING—Embarrassing—Alternative 492
See Practice. 2.

POSSESSION—Compensation for want of - 390
See Vendor and Purchaser. 2.

POWER—*Appointment—Excessive Exercise—Attempted Delegation—Validity of Appointment in Default of Exercise of delegated Power.*] The donee of a power of appointment among his own children appointed to his son for life, with remainder to the son's children as he should appoint, and, in default of such appointment, to the son absolutely. The son died without having attempted to exercise the power thus delegated to him:—*Held*, that the ultimate limitation in favour of the son was valid and took effect.—Observations of Lord St. Leonards (Sugden on Powers, 8th ed. p. 515) commented on and explained. Williamson *v.* Farwell - - - 128

POWER OF SALE—Lunatic—Committee - 470
See Lunatic.

—— Mortgage - - - - 544, 668
See Mortgage. 3, 4.

PRACTICE—*Action for Account—Account rendered—Payment into Court before Trial—Interlocutory Application.*] Upon an interlocutory application for the payment of money into Court made before the trial of an action for the taking of an account, where an account has been rendered, and the Court has before it the parties to the account and evidence as to the items in dispute between them, the Court will look into the facts of the case, and if in the fair exercise of its judicial discretion it can arrive at a conclusion that a sum will be due to the Plaintiff on the taking of the account, and what the amount of that sum will be, the Court will order the Defendant to pay that amount into Court. Wanklyn *v.* Wilson - - - - - 180

2. —— *Alternative Pleading—Embarrassing and inconsistent Defences — Rules of Supreme Court*, 1883, *Order* xix., *rr.* 4, 16, 24, *and* 27; *Order* xx., *r.* 7—*Costs of Shorthand Note of Judgment.*] Pleadings will not necessarily be struck out as embarrassing because they are inconsistent. —In an action by the representatives of a wife against the executor of the husband in respect of sums of money and stock alleged to have been received by the husband as trustee for the separate use of the wife, the defence pleaded (1) that the sums had not been received; (2) if received, not as trustee; (3) if received, repayment; (4) alternatively, free gift by the wife to the husband; (5) alternatively, accord and satisfaction; (6) alternatively, set-off; (7) the Statute of Limitations; (8) laches and delay.—On a summons to have defences 3, 4, 5, and 6 struck out, North J., declared that the statement of defence was embarrassing, and gave the Defendant leave to amend.—Upon appeal, the Court (Lindley and Bowen, L.JJ.) discharged the order of North, J., and directed the Defendant either to amend or to give particulars within fourteen days after discovery of documents.—It is unnecessary for a successful appellant to make special application for allowance of the costs of the shorthand writer's note of the judgment of the Court below. *In re* Morgan. Owen *v.* Morgan - - C. A. 492

PRACTICE—*continued.*

3. —— *Attachment—Contempt of Court—Interference with Receiver and Manager of Business—Circular containing Libel on Business.*] A libel on the business carried on by a receiver and manager appointed by the Court is a contempt of Court, and may be punished by committal of the offender.—After the Court had made an order appointing a receiver and manager of a business a former clerk of the firm sent round a circular to the customers of the firm containing an unfair statement of the effect of the order, and soliciting their custom for his own business. As he declined to give an undertaking not to repeat the offence, the Judge committed him to prison for contempt of Court, and the committal was upheld by the Court of Appeal. Helmore *v.* Smith (2) [C. A. 449

4. —— *Concurrent Actions—Action in Colony and in England—Counter-claim.*] B., of London, and M. & C., of Honduras, carried on business in partnership at Honduras as G. & Co. B. & N. carried on business in partnership in London under the same name. The Honduras firm employed the London firm as their agents under an agreement by which B.'s share in the profits of the Honduras firm was to be brought into account as between the two firms to the credit of the English firm. The Honduras partnership was dissolved, and B. obtained a decree in Honduras for taking the partnership accounts. Before those accounts had been fully taken, M. & C. brought this action in England against the London firm for an account of the dealings between the two firms, alleging the Defendants to have made improper profits in their agency. The Defendants denied having made improper profits, and by counter-claim claimed to have the accounts of the Honduras firm taken. North, J., ordered the counter-claim to be struck out:—*Held*, by the Court of Appeal, that though if M. & C. had not brought this action, B. would not, after obtaining a decree in Honduras, have been allowed to carry on another action here for the same purpose, still as the two actions were so closely connected that neither of them could be finally wound up independently of the other, B. ought not to be prevented from proceeding with his counter-claim so as to be in a position to ask at the trial of this action for such a decree as might be right, having regard to the then position of the Honduras action; and that on N.'s undertaking to be bound by the proceedings in the Honduras action, the order of North, J., must be discharged. Mutrie *v.* Binney - - - - C. A. 614

5. —— *Default — Mortgage — Foreclosure — Writ or Summons—Costs—Claim for Receiver—Judgment in Default of Appearance—Extent of Relief—Rules of Supreme Court*, 1883, *Order* xix., *r.* 10; *Order* xx., *r.* 4; *Order* lv., *r.* 5*a*.] Notwithstanding the provision of rule 4 of Order xx., that whenever a statement of claim is delivered, the plaintiff may therein extend his claim without any amendment of the indorsement of the writ—the plaintiff cannot, when the defendant does not appear to the writ and a statement of claim is delivered by filing it with the proper

PRACTICE—*continued.*
officer, obtain judgment in default of appearance for more than he has claimed by his writ.—*Semble*, that a receiver may be appointed under an originating summons. GEE *v.* BELL - - 160

6. —— *Production of Documents—Discovery—Privilege—Fraud—Trustee.*] An action was brought for an account of profits in respect of a purchase of trust property, on allegations that the sale was secretly made for the benefit of R., one of the trustees, with the connivance of T., another trustee who was a solicitor. The representatives of R. claimed privilege from production for letters from T. to R. and for T.'s bill of costs, on the ground that the communications were made by T. acting as solicitor to R. in his private capacity. Production was ordered because the communications passed between two trustees, and because the solicitor and his client were charged with fraud. *In re* POSTLETHWAITE. *In re* RICKMAN. POSTLETHWAITE *v.* RICKMAN - - 722

7. —— *Security for Costs of Appeal.*] Notice of appeal from an interlocutory order was served on the 8th of February. On the 10th of February the Respondent gave notice of motion for security for costs. The appeal motion and the motion for security came into the paper on the 16th. Poverty was sufficiently established, and it was also sworn to and not denied that the person really promoting the appeal was a person of substance:—*Held*, that security ought to be given.—*Pooley's Trustee* v. *Whetham* (33 Ch. D. 76) distinguished. *In re* CLOUGH. BRADFORD COMMERCIAL BANKING COMPANY *v.* CURE C. A. 7

8. —— *Security for Costs of Appeal—Delay.*] Order for security for costs made although the appeal was in that day's paper for hearing, there having been no delay in making the application except a slight delay which was attributable to the Appellant. ELLIS *v.* STEWART - C. A. 459

9. —— *Staying Proceedings—Unpaid Costs—Contempt—Pending Summons.*] Although mere non-payment of the costs of an interlocutory motion which a plaintiff has been ordered to pay, is not per se sufficient ground for ordering further proceedings in his action to be stayed, in cases where the party is acting vexatiously in withholding payment of costs, there is jurisdiction, upon application by summons, to stay proceedings until he has complied with the order for payment.—*In re Neal* (31 Ch. D. 437) and *In re Youngs* (31 Ch. D. 239) questioned.—Pending a summons before North, J., to whose Court the action was attached, to stay all further proceedings until the Plaintiff should have paid the costs which he had been ordered to pay, the action, at the Plaintiff's instance, came on for trial before Kekewich, J., to whom it had been transferred for trial only. Defendant having taken the preliminary objection that the costs in question had not been paid, Kekewich, J. ordered the trial to stand over generally, with liberty to Plaintiff to restore the action to the paper on payment of the costs; —*Held*, that the order ought to have postponed the trial not until the costs should have been paid, but until the summons before North, J., should have been disposed of:—*Held*, also that North, J., had in the circumstances, rightly upon the summons ordered proceedings to be stayed

PRACTICE—*continued.*
until the Plaintiff had complied with the order for payment of costs. *In re* WICKHAM. MARONY *v.* TAYLOR - - - - C. A. 272

10. —— *Third Party Procedure—Interrogatories by Third Party—"Opposite Parties"—"Defendant"—Rules of Supreme Court*, 1883, *Order* XVI., *r.* 48; *Order* XXXI., *r.* 1—*Judicature Act*, 1873, *s.* 100.] Persons who are served by a defendant with a third party notice are not thereby made defendants within the definition of the word in the Judicature Act, 1873, s. 100, nor do they become defendants by putting in a statement of defence. But where persons had been served with a third party notice by the defendant for the purpose of claiming an indemnity, and had obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2) that they should be at liberty to appear at the trial of the action and oppose the plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses:—*Held* (reversing the decision of Kay, J.), that the third parties had been placed by the order in the position of defendants, and had a right to examine the plaintiff by interrogatories under Order XXXI., r. 1. EDEN *v.* WEARDALE IRON AND COAL COMPANY [C. A. 287

11. —— *Trial by Jury—Discretionary or of Right—Onus—Rules of Supreme Court*, 1883, *Order* XXXVI., *rr.* 2–8.] In an action for injunction to restrain infringement of copyright and for damages:—*Held*, that the Defendant had no right to a trial by jury, but that under Order XXXVI., rules 4 and 7 (*a*) the Court had a discretion which it exercised by directing a trial without a jury.—*Semble*, that the burden of proof was on the party applying for a jury. COOTE *v.* INGRAM - - - - - - 117

—— Judgment—Specific performance - 188
See SPECIFIC PERFORMANCE. 1.

—— Patent - - - - - 283
See PATENT. 2.

—— Winding-up of company - - 1
See COMPANY. 8.

—— Trustee Acts - - - - 457
See TRUSTEE ACTS.

PRINCIPAL AND AGENT—Sale by agent to principal—Fiduciary relation - 400
See COMPANY. 4.

PRIOR PUBLICATION—Patent—Foreign patent
See PATENT. 1. [416

PRIVILEGE—Production of documents - 722
See PRACTICE. 6.

PRODUCTION OF DOCUMENTS - - 722
See PRACTICE. 6.

PROMOTER—Fiduciary relation - - 400
See COMPANY. 4.

PROPERTY RECOVERED—Solicitor—Lien 489
See SOLICITOR. 2.

RAILWAY COMPANY — *Diversion of Road — Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 53.] Sect. 43 of the Railways Clauses Consolidation Act, 1845, applies to a per-

RAILWAY COMPANY—*continued.*
manent diversion as well as a temporary diversion of a road. Attorney-General *v.* Barry Docks and Railway Company - - 573

2. —— "*Tolls*"—*Lien of Railway Company—Hiring Agreement—Railways Clauses Act*, 1845, *ss.* 3, 97.] Under the first part of sect. 97 of the Railways Clauses Consolidation Act, 1845, which prevides that on failure "to pay the tolls due in respect of any carriage or goods," the company may detain and sell "such carriage, or all or any part of such goods," the company has no right to detain and sell a carriage for default in payment of tolls due only in respect of the goods carried on it.—By an Act with which the Railways Clauses Consolidation Act was incorporated, a railway company was authorized to charge a certain rate per ton per mile for coal carried on its line, with additional rates per ton per mile if the company supplied carriages and engines, but no mention was made of a toll for carriages conveyed on their line. The B. company conveyed coals on the line in their own carriages, the railway company supplying power, and rendering accounts by which they charged the authorized rates per ton per mile for the coals and power, but did not charge any toll for the carriages:—*Held* (reversing the judgment of Bacon, V.C.), that the railway company could not detain and sell the carriages for the tolls due.—*Semble*, that the latter part of the section, which enables the company to detain and sell for tolls due to them any carriages or goods on the premises of the company belonging to the persons owing the tolls, is not confined to carriages or goods to which the debtor is absolutely entitled, but if he has only a partial interest the company can only sell such interest as he has.—Whether under the latter part of the section carriages can be detained and sold for tolls due on goods, *quære*. North Central Wagon Company *v.* Manchester, Sheffield, and Lincolnshire Railway Company - - - 191

—— Transfer of stock - - - 598
See Company. 5.

REAL ESTATE—Married Women's Property Act
See Husband and Wife. 1. [345

RECEIPT—Bills of Sale Act - - 191
See Bills of Sale. 1.

RECEIVER—Interference with—Attachment 449
See Practice. 3.

—— Originating summons - - - 160
See Practice. 5.

REGISTRATION—Contract for shares - 579
See Company. 1.

—— Lis pendens - - - - 297
See Administration Action.

—— Trade-mark - - 162, 231, 248
See Trade-mark. 3, 4, 5.

—— Transfer of stock - - - 598
See Company. 5.

REGISTRY ACTS—*Middlesex Registry—Registration of Final Order of Foreclosure—Middlesex Registry Act* (7 *Anne*, *c.* 20), *s.* 18—1 *&* 2 *Vict. c.* 110—*Jurisdiction*] An order for foreclosure absolute in respect of lands in Middlesex is not a judgment within the meaning of 7 Anne, c. 20, s. 18, and 1 & Vict. c. 110, so as to require a

REGISTRY ACTS—*continued.*
memorial to be entered at the Middlesex Registry Office; and a direction to the Registrar of Deeds to that effect was refused. Burrows *v.* Holley [123

REMOTENESS—Gift at twenty-five - - 350
See Will. 4.

REMUNERATION—Directors - - 502
See Company. 2.

—— Solicitor - - - - - 568
See Solicitor. 1.

RENT—Distress after winding-up - - 656
See Company. 6.

—— Occupation—Mortgagor in possession 125
See Mortgage. 2.

REPAIRS—Settled Land Act - - 307
See Settled Land Act. 3.

RESIGNATION — Ecclesiastical benefice—Validity - - - - - 48
See Benefice.

RESTRAINT ON ANTICIPATION - - 4
See Husband and Wife. 2.

RESTRAINT OF TRADE — *Agreement in Restraint of Trade — Validity — Reasonableness—Partial Enforcement.*] In an agreement for employment as a milk carrier, the servant undertook not to serve or interfere with any customer served or belonging at any time to the master, his successors or assigns:—*Held*, that, if on the construction of the undertaking it was not limited to interference with persons who were customers during the employment of the servant, the undertaking was severable, and capable of enforcement in respect of persons who were customers during the employment. Baines *v.* Geary - 154

REVERSION — Personal estate — Post-nuptial settlement - - - - 21
See Infant.

ROAD—Diversion of—Railways Clauses Act 573
See Railway Company. 1.

RULES OF SUPREME COURT, 1883, Order XVI., r. 48 - - - - - 287
See Practice. 10.

—— **Order XIX., rr. 4, 16, 24, 27** - - 492
See Practice. 2.

—— —— **r. 10** - - - - 160
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—— **Order XX., r. 4** - - - - 160
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—— —— **r. 7** - - - - 492
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—— **Order XXXI., r. 1** - - - 287
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—— **Order XXXVI., rr. 2–8** - - 117
See Practice. 11.

—— **Order LV., r. 5 a** - - - 160
See Practice. 5.

RULES OF SUPREME COURT, DECEMBER, 1885, Order XXXVIII. r. 19 a - 457
See Trustee Acts.

SECURITY FOR COSTS - - 7, 459
See Practice. 7, 8.

SEPARATE ESTATE - - - 4, 345
See HUSBAND AND WIFE. 1, 2.
—— Debt payable out of—Statute of Limitations
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SERVICE—Out of jurisdiction—Winding-up of company - - - - 1
See COMPANY. 8.

SETTLED LAND ACT—*Infant Tenant for Life—Power of Sale—Appointment of Persons to exercise Powers of a Tenant for Life*—45 & 46 *Vict. c.* 38, *ss.* 38, 45, 60.] Where, in the absence of any trustees of a settlement within the meaning of the Settled Land Act, capable of exercising powers of sale over the settled land, an appointment has been made under sect. 60 of persons to exercise on behalf of an infant tenant for life the powers of a tenant for life, and to sell part of the settled estate, the persons so appointed can make a good title without the necessity of appointing under sect. 38 trustees of the settlement to whom notice of the intended sale can be given under sect. 45.—The order made under sect. 60 ought in such a case to direct that the purchase-money be paid into Court. *In re* COUNTESS OF DUDLEY'S CONTRACT [338

2. —— *Settled Land — Permanent Improvements—Payment of Cost out of Capital Money—Approval of Scheme by Trustees*—45 & 46 *Vict. c.* 38, *ss.* 21, 25, 26.] In order that the Court may sanction the expenditure of "capital money" under the Settled Land Act, in payment of the cost of permanent improvements to the settled estate, a scheme for the proposed works must be submitted by the tenant for life to the trustees, before the works are commenced. If the tenant for life executes the works at his own expense, without first submitting a scheme to the trustees and obtaining their approval, the Court cannot then authorize the repayment of the cost out of "capital money."—Decision of *North*, J., affirmed. —*Held*, by *North*, J., that the Court will not hear counsel for the trustees of a settlement in support of an application by the tenant for life when his interest is opposed to those of the remaindermen, it being the duty of the trustees to act as a check upon him.—Whether the expense of improvements on lands which have been sold, and so are no longer comprised in the settlement, can be afterwards paid out of capital money, *quære*. *In re* HOTCHKIN'S SETTLED ESTATES - - C. A. 41

3. —— *Repairs and Improvements — Income or Capital*—45 & 46 *Vict. c.* 38, *s.* 25.] Lands were devised in 1861 to trustees during the lives of certain tenants for life, in trust to receive the rents and manage the estate with the powers of absolute owners. An annuity was directed to be paid to the tenant for life in possession out of the rents, and the surplus rents were to be laid out in the purchase of real estates or accumulated for a period of twenty-one years from testator's death, and the income of the accumulations paid to the tenant for life, From the expiration of that period the whole of the surplus rents yearly accruing to be paid to the tenant for life in possession, and also the income of the accumulated surplus.—The period of twenty-one years from testator's death expired in January, 1885. The trustees named in the will disclaimed, and the property had since been

SETTLED LAND ACT—*continued.*
managed by a receiver appointed by the Court. The surplus rents accumulated during the twenty-one years amounted to £37,000.—Repairs and improvements amounting to between £4000 and £5000 were required to be made on the settled property:—*Held*, that such of the proposed works as were in the nature of improvements within the description contained in sect. 25 of the Settled Land Act, 1882, should be provided for out of the £37,000, which was capital money within the Act; and that those which were merely repairs must be paid for out of the income of the property. CLARKE *v.* THORNTON - - 307

SETTLEMENT—Post-nuptial—Infant - 21
See INFANT.
SHARES—Contract for—Registration - 579
See COMPANY. 1.
SHORTHAND NOTES—Costs - - 492
See PRACTICE. 2.

SOLICITOR—*Bill of Costs—Taxation—Solicitors' Remuneration Act*, 1881, *Gen. Ord., Sched I., Part I.—Procuration Fee*—6 & 7 *Vict. c.* 73, *ss.* 37, 41—*Taxation after Twelve Months—Special Circumstances.*] The charge by a mortgagor's solicitor to his client of a scale fee "for negotiating loan" in addition to the procuration fee according to the scale paid to mortgagee's solicitor, is an overcharge amounting to fraud so as to entitle the client to an order to tax on application more than a year after delivery of the bill; especially when coupled with the fact that the solicitor by whom the overcharge was made had not complied with his client's instructions to get the bill taxed. *In re* PYBUS - - 568

2. —— *Lien—Property recovered—Costs ordered to be refunded* — 23 & 24 *Vict. c.* 127, *s.* 28.] Costs paid under order of the Court below and ordered by the Court of Appeal to be refunded are property recovered within the meaning of the 23 & 24 Vict. c. 127, s. 28.—An action was dismissed with costs, which were taxed at £298 and paid. On appeal this judgment was reversed, leave was given to amend the pleadings, and the action was ordered to proceed on the amended pleadings, and the Defendants were ordered to repay to the Plaintiffs their costs of the appeal, which were taxed at £165. After this the Plaintiffs became bankrupt:—*Held*, on the application of the solicitors who had acted for the Plaintiffs in the appeal, that they were entitled to receive from the Defendants the £165, and also to receive from the Defendants out of the £298 the difference between the £165 and the Plaintiffs' costs of the appeal taxed as between solicitor and client, and that the balance only of the £298, after paying the above difference and the costs of the solicitors and the Defendants of the application, was to be paid to the trustee in the bankruptcy. GUY *v.* CHURCHILL C. A. 489

SPECIFIC PERFORMANCE—*Defendant not appearing at Trial—Judgment—Practice.*] In a vendor's action to enforce a contract to purchase leaseholds, the Defendant by his statement of defence admitted that he was unwilling to complete the contract, and did not appear at the trial:—*Held*, that the Plaintiff was not entitled to immediate judgment rescinding the contract and

SPECIFIC PERFORMANCE—*continued.*
forfeiting the deposit, but only to the usual judgment for specific performance. Stone *v.* Smith [188

2. —— *Parol Agreement—Part-performance—Easement—Light—Interest in Land—Injunction—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.] The equitable doctrine of part performance has not been confined to contracts for the acquisition of an interest in land.—Probably it applies to all cases in which the Court would entertain a suit for specific performance if the contract had been in writing.—A verbal agreement for an easement may be enforced where there has been part performance, whether it is or is not within the 4th section of the Statute of Frauds.—And *semble* it is within the section. — *Britain* v. *Rossiter* (11 Q. B. D. 123) discussed.—The Plaintiff and Defendant, the owners of adjoining houses, being about to rebuild, entered into a verbal agreement that the Plaintiff should pull down a party-wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight with the lower end resting on the party wall. The Plaintiff rebuilt the party-wall and erected a lean-to skylight on his side of it as agreed: the Defendant also erected a skylight on his side, but, instead of a lean-to, so shaped it as to obstruct the access of light to the Plaintiff's premises more than the agreed lean-to skylight would have done:—*Held*, that the effect of the agreement was to give to each party an easement of light over the other's land; and that the Plaintiff, having performed the agreement on his part, was entitled to have it enforced on the part of the Defendant. A mandatory injunction was accordingly granted, the Plaintiff being put under a corresponding undertaking. McManus *v.* Cooke [681

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29 Car. 2, c. 3, s. 4—*Frauds* - - 681
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21 Jac. 1, c. 16, s. 3—*Limitations, Statute of*
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7 Anne, c. 20, s. 18—*Middlesex Registry* 123
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43 Geo. 3, c. 108—*Church Building* - 589
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8 & 9 Vict. c. 20, s. 53 - - - 573
See Railway Company. 1.

12 & 13 Vict. c. 26—*Leases* - - 519
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13 & 14 Vict. c. 17—*Leases* - - 519
See Landlord and Tenant.

13 & 14 Vict. c. 60—*Trustee Act* - - 457
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16 & 17 Vict. c. 137, s. 66—*Charitable Trusts*
See Charity. 2. [147, n.

16 & 17 Vict. c. 70, ss. 116, 136—*Lunacy Regulation* - - - - 470
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18 & 19 Vict. c. 43—*Infants' Settlement* - 21
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23 & 24 Vict. c. 127, s. 28—*Solicitors* - 489
See Solicitor. 2.

25 & 26 Vict. c. 89, ss. 87, 163—*Companies* 656
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30 & 31 Vict. c. 131, s. 25—*Companies* - 579
See Company. 1.

32 & 33 Vict. c. 62, s. 15—*Debtors* - 266
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33 & 34 Vict. c. 93, s. 8—*Married Women's Property* - - - - 345
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34 & 35 Vict. c. 43, ss. 34, 36—*Ecclesiastical Dilapidations* - - - 583
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36 & 37 Vict. c. 66, s. 100—*Judicature* - 287
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41 & 42 Vict. c. 31, s. 4—*Bills of Sale* - 191
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See RESTRAINT OF TRADE.

TRADE-MARK—*Infringement—Death of registered Owner—Right of Executors to sue—Actio personalis moritur cum personâ.*] An action to restrain the infringement of a registered trade-mark with the usual claim for an account of profits and damages is not within the rule actio personalis moritur cum personâ, but, being brought in respect of injury to the property of the owner of the mark, may be continued by his executors after his death. OAKEY & SONS *v.* DALTON 700

2. —— *Infringement—Trade-name—Label—Injunction—Patents, Designs, and Trade-marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 77, 103.] In July, 1885, M., of Dizy in France, commenced the consignment to the Plaintiff in London of champagne under the label of "Le Court et Cie, Rheims," which had then recently been registered in France as his trade-mark, and to which in December, 1886, his right was established in proceedings against X. before the French tribunal. Further consignments were made to the Plaintiff down to July, 1886, and advertised and sold by him as Le Court et Cie's champagne. In March, 1886, the Defendant, trading under the name of "Short & Co.," began to sell (chiefly at a wine bar across the counter) champagne which was sent to him from France by X. as Le Court et Cie's champagne; and it appeared that in 1882 he had proposed to register in France a label with the name Le Court et Cie as corresponding to his own trade-name of Short & Co., but from difficulties in obtaining registration abandoned the idea. Upon motion by the Plaintiff to restrain the use of the name and brand by the Defendant:—*Held*, by the Court of Appeal, reversing the decision of Chitty, J., that neither on the ground of trade-mark nor of trade-name was the Plaintiff entitled to an injunction against the Defendant: in the former case because, the label being capable of registration in this country and not having been registered, the Plaintiff was precluded by sect. 77 of the Trade-marks Act, 1883, from instituting proceedings to restrain infringement of a trade-mark: and in the latter because the evidence failed to shew that either by long user or reputation had the wine sold under the name and brand "Le Court et Cie" become so associated with the wine of the Plaintiff as to enable him to assert his common law right of restraining another person from passing off his goods as those of the Plaintiff. GOODFELLOW *v.* PRINCE - - - C. A. 9

3. —— *Registration — Application for Registration before Act of* 1883*—Abandonment by Agent of Applicant—Fresh Application by Applicant in respect of same Mark after Act—Three Marks Rule—Trade Marks Registration Act*, 1875 (38 & 39 *Vict, c.* 91), *ss.* 3, 5—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 63, 76, 90, 113.] Sect. 63 of the Trade Marks Act of 1883 is retrospective in its operation.—There is nothing in the Trade Marks Act of 1883 to take away the common law right of an applicant for registration who is sui juris to appoint an agent for all the purposes of his application, and if he does so the notices required by the Act may properly be sent to him through such agent.—S., a foreigner, applied in 1876, through an English trade-mark society, for registration of a trade-mark. The Cutlers' Company gave notice of a similar mark which had been assigned by them, and the Registrar thereupon wrote to S. at the society's address to say that he could not proceed with the application until S. had obtained the leave of the Court. This letter was never communicated to S. by the society, who proceeded no further with the application; but S. having seen the advertisement of his application in the Trade Marks Journal believed that his mark had been registered, and N., an agent of his, sold goods in England marked with his mark. In the year 1877 the Plaintiffs registered a mark resembling the Cutlers' mark, and in 1883 brought an action against N. to restrain him from infringement, and S., finding his mark was not on the register, then made a fresh application for registration:—*Held*, that S. was "in default," and that his original application must be deemed to have been "abandoned" within the meaning of sect. 63 of the Act of 1883, and could not now be proceeded with.—But *held* also, that S. being under no disability from laches or conduct was not barred either by sect. 3 of the Act of 1875 or by sect. 76 of the Act of 1883, and was entitled to make a fresh application for registration. JACKSON & Co. *v.* NAPPER. *In re* SCHMIDT'S TRADE-MARK - - 162

4. —— *Registration — "Fancy word not in common use"—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 69.] Where,

TRADE-MARK—*continued.*

upon opposition to an application to register a trade-mark, the case stands for the determination of the Court under sect. 69, sub-s. 4, of the Patents, Designs, and Trade Marks Act of 1883, the Court has jurisdiction to enter into and determine all questions arising upon the objections, including, in a case where the Comptroller has already registered the mark the question whether the mark has been rightly admitted on the register. —Where the name or word was originally, or has come to be, descriptive of the article to which it is applied, so that while indicating what the article is, it does not connect it with any particular manufacturer, such name or word cannot be registered as a trade-mark. — Accordingly, where at the time of an application made in 1884 for the registration of the word "Gem" as a trade-mark for air guns which in 1881 had been newly introduced into England and called "Gem" air-guns by the Applicant, the word "Gem" had become descriptive of a particular pattern of gun, and not merely of the Applicant's gun, it was held that the word could not be registered as the Applicant's trade-mark for air-guns.—Per Cotton and Lopes, L.JJ., Lindley, L.J., dubitante: The word "Gem" having now come to indicate the excellence of the article to which it is applied is not now a "fancy word" within the meaning of the Patents, Designs, and Trade Marks Act, 1883, sect. 64, sub-sect. 1 (*c*).—Decision of Kay, J., reversed. *In re* Arbenz' Application - - - - C. A. 248

5. —— *Registration—Refusal by Comptroller to register—Appeal—Board of Trade—Patents, Designs, and Trade Marks Act*, 1883, *ss.* 62, *sub-s.* 4, 90.] A person whose application to register a trade-mark has been refused by the Comptroller cannot appeal direct to the Court from such refusal, as a person aggrieved by the omission of his name from the register under sect. 90 of the Patents, Designs, and Trade Marks Act, 1883, but must take the special course prescribed by sect. 62 (sub-sect. 4) of appealing to the Board of Trade from the Comptroller's decision. *In re* Trade-mark "Normal" C. A. 231

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See Bill of Sale. 2.

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—— Sale to co-trustee - - - 373
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TRUSTEE ACTS—*Practice—New Trustees—Verification of Consent of Trustee to act—Rules of Supreme Court, December*, 1885, *Order* XXXVIII., *r.* 19 *a.*] Where a new trustee is appointed in Chancery as well as in Lunacy, his signature to his consent to act may be verified in manner provided by Order XXXVIII., rule 19 *a*, and need not be verified by affidavit according to the old practice. *Secus*, where the order is made in Lunacy only.—*In re Wilson* (31 Ch. D. 522) explained. *In re* Hume - - C. A. 457

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See Mortgage. 1.

VENDOR AND PURCHASER—*Contract abandoned by Purchaser — Forfeiture of Deposit — Defect in Title subsequently discovered—Action to recover Deposit—Delay.*] The conditions in a contract for the sale of land provided, amongst other things, that the purchaser should pay a deposit on the purchase-money, and that if he should fail to comply with the conditions his deposit money should be forfeited to the vendors, who should be at liberty to re-sell the property. The purchaser paid the deposit, investigated and accepted the title, but when the time came for completion, being unable to find the balance of the purchase-money, he abandoned the contract. The vendors consequently rescinded the contract and forfeited the deposit. Three years after the purchaser heard that on a re-sale by the vendors under the same conditions an objection had been taken to the title which had been held fatal, and thereupon brought an action to recover his deposit on the ground that there had been a mutual mistake and a total failure of consideration in his contract:—*Held*, following *Howe* v. *Smith* (27 Ch. D. 89), that he was not entitled to recover his deposit.—*Semble*, that he was also precluded from relief by his laches.—*Want* v. *Stallibrass* (Law Rep. 8 Ex. 175) distinguished. Soper *v.* Arnold [384

2. —— *Possession—Damages—Loss of Tenant—Compensation — Vacant Property — Deterioration.*] Two houses, stated in the particulars to have been "recently in the possession of F.," were put up by the Plaintiffs (mortgagees from F.) for sale by auction, and were bought by the Defendant. A day was fixed for completion of the purchase, when rents or possession were to belong to the purchaser. At that day F. was still in possession, and remained so until he was turned out by the sheriff, more than a month after. The purchaser had agreed to let the houses to a tenant as from a day five days later than the day fixed for completion, but the tenant, finding that he could not have immediate possession, had refused to take the houses, which had remained unoccupied, and had also been damaged by the removal of some fixtures and otherwise. The vendors brought an action for specific performance simply. The Defendant counter-claimed for specific performance with compensation:—*Held*, that the purchaser was entitled to damages in the nature of compensation for loss of a tenant, and that the damages would be the amount of rent lost.—*Bain* v. *Fothergill* (Law Rep. 7 H. L. 158) distinguished. — *Held*, that the purchaser was entitled to damages for the deterioration of the

VENDOR AND PURCHASER—*continued.*

property.—*Phillips* v. *Silvester* (Law Rep. 8 Ch. 173) followed and discussed. Royal Bristol Permanent Building Society *v.* Bomash 390

—— Specific performance—Judgment by default *See* Specific Performance. 1. [188

—— Title to leaseholds—Executor - 561 *See* Executor.

WILL — *Children* — "*Children*," *held to mean* "*Grandchildren.*"] A testator gave his residuary real and personal estate to trustees in trust for sale, and to divide the proceeds into six shares, and to pay one of such shares to the "children" of his deceased sister; and he gave the other five-sixths in similar terms to the "children" of five deceased persons. At the date of the will there were no children of the sister living, but there were two grandchildren, and these facts were well known to the testator. Both the grandchildren survived the testator:—*Held*, that the two grandchildren took the one-sixth given to the "children" of the deceased sister.—*Radcliffe* v. *Buckley* (10 Ves. 195) distinguished. *In re* Smith. Lord *v.* Hayward - - - 558

2. —— *Children—Future Illegitimate Children to be in esse at the Death of the Testator*] H. by his will gave a trust fund "in trust for my four natural children by M. E. M., viz., J., C., E. and J. H., and all and every other children and child which may be born of the said M. E. M. previous to and of which she may be pregnant at the time of my death, share and share alike." Besides the four children named in the will there were three other children born of M. E. M. after the date of the will and before the death of the testator, all of whom were known by his surname:—*Held*, (1), that upon the construction of the will the word "children" must be taken to include illegitimate children, and was not void for uncertainty; and (2) that being a gift by will to illegitimate children of the testator to be in esse before the death of the testator, it was a good gift within the rule laid down in *Occleston* v. *Fullalove* (Law Rep. 9 Ch. 147), and that the children who came into esse after the date of the will and before the death of the testator were entitled to share in the gift. *In re* Hastie's Trusts - - 728

3. —— *Children—Illegitimate Child described as* "*Nephew*" *of Testator.*] A testator described R. W. and another person (who was a legitimate nephew of the testator) as "my two nephews." He gave his residuary estate upon trust for the "children" of his brothers E. H. and T. H., and of his sister J. W. and his late sister S. B., in

WILL—*continued.*

equal shares, with a gift over if any one or more of his "nephews and nieces" should die before him leaving children. R. W. was an illegitimate child of J. W., who had four legitimate children, three sons and one daughter:—*Held*, that the circumstance that R. W. was described by the testator as "nephew" was not sufficient to entitle him to share under the gift to the children of J. W. *In re* Hall. Branston *v.* Weightman [551

4. —— *Vesting—Gift of Residue to Children of Nephew to be vested Interests in Sons at Twenty-five Years of Age, and in Daughters at Twenty-five or Marriage—Remoteness.*] Testatrix directed that as to one moiety of the residue of her estate the trustees should hold it upon trust for the benefit of the children of her nephew, W. H., to be vested interests in them; as to sons on their attaining the age of twenty-five years; and as to daughters on their attaining twenty-five years, or being married before that age; and in case a daughter should marry under age, power was given to the trustees to settle her share. Power was also given to the trustees to apply the income of an expectant share of any child for maintenance, education, and bringing up, and also to apply half of an expectant share for advancement in life. In case all the children of W. H. should die without taking a vested interest, there was a gift over to testatrix's brothers and sister, &c. W. H. had seven children, four born before the testatrix's death, all being now infants, and three afterwards. A daughter, one of the four, had married under age:—*Held*, that the four children and those only could take, and that the daughter took a vested interest which at present was one-fourth.—*Elliott* v. *Elliott* (12 Sim. 276) followed. *In re* Coppard's Estate. Howlett *v.* Hodson [350

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—— "Nephew" - - - - 551 *See* Will. 3.

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